United States Court of Appeals

for the Second Circuit

APPENDIX

76-7236

B

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

ANNICE GILBERT,

Plaintiff-Appellant-Cross-Appellee,

v.

CONSOLIDATED FOODS CORP.,

Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX OF DEFENDANT-APPELLEE CROSS-APPELLANT

UNITED STATES COURT OF APPEALS
FILED
OCT 18 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PHILIP HANDELMAN, ESQ.
360 Lexington Avenue
New York, New York 10017
(212) MU 2-9180
Attorney for Plaintiff-Appellant-Cross-Appellee

ROGERS HOGE & HILLS
90 Park Avenue
New York, New York 10016
(212) 953-9200
Attorneys for Defendant-Appellee-Cross-Appellant

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

Docket Entries	1a
Judgment	8a
Opinion on Liability	9a
Endorsement Opinion on Motion to Amend	25a
Opinion on Damages	26a
Complaint	37a
Answer as Amended	40a
Notice of Cross-Appeal	42a
Joint Pre-Trial Order	43a
Excerpts from Transcript on Liability, Stanton	50a
Excerpts from Transcript on Liability, Mrs. Gilbert ..	103a
Excerpts from Transcript on Liability, Colloquy	117a
Excerpts from Transcript on Liability, Motion to Dismiss	118a
Excerpts from Transcript on Liability, Colloquy	152a
Excerpts from Transcript on Liability, Robbins	156a
Excerpts from Transcript on Liability, Summations	159a
Excerpts from Transcript on Damages, Backman	189a
Excerpts from Transcript on Damages, Zern	211a
Excerpts from Transcript on Damages, Stanton	213a
Excerpts from Transcript on Damages, Sheerin	232a
Pl. Ex. 26, Aris correspondence with Harvey Chanler	244a
Def. Ex. A (at Damage Hearing) Analysis of Chanler Statements	282a

1a

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE LASKER

Jury demand date:

70 CIV. 4536

Form No. 106 Rev.

TITLE OF CASE

AINICE GILBERT

VS

CONSOLIDATED FOODS CORP.

ATTORNEYS

For plaintiff:
PHILIP HANDELMAN
360 Lexington Avenue,
N.Y.C.N.Y. 10017

For defendant:
Rogers Hoge & Hills
90 Park Ave. NY 10016 687-3120

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB
J.S. 5 mailed X	Clerk					
J.S. 6 mailed 7-7-72	Marshal					
Basis of Action: BREACH OF CONTRACT. $250,000	Docket fee					
	Witness fees		5/11/72			
Action arose at:	Depositions		5/15/72			

BEST COPY AVAILABLE

ANNICE GILBERT VS. CONSOLIDATED FOODS CORP. 2a

70 CIV. 4536

DATE	PROCEEDINGS	Date Ord Judgment
oct16-70	Filed Petition and Record for Removal, Supreme Ct. N.Y.C. N.Y. County.	
oct.19-70	Filed Notice to take Deposition.	
oct.19-70	Filed ANSWER of Consolidated Foods Corp. to complaint.	RH&H
oct16-70	Filedn Notice of Assignment.	
oct16-70	Filed Underting for Removal ($500.))NATIONAL SURETY CO.	
Dec7,70	Filed deft notice to take deposition of David Gilbert	
Feb5,71	Filed deft notice to take deposition of Henry Cohen	
Jun24-71	Filed Notice to take Deposition of David D. Gilbert.	
Jun 28-71	Filed Notice of Amendment of Notice to take Deposition.	
Jul 15-71	Filed Order to Show Cause re: Contempt Ret. 7/22/71	
Jul 15-71	Filed Memorandum in support of motion to hold witness in contempt.	
7-22-71	Filed (in court) Affidavit of Philip Handelman.	
7-22-71	Filed MEMO.END. on motion papers filed 7/15/71. SETTLE ORDER ON NOTICE providing that the deposition is to proceed at 10 AM on 8/4/71 in this Courthouse. etc.etc. Frankel, J.	
7 26-71	Filed ORDER adjourning the return of the subpoena duces tecum until 8/4/71; ordered that any questions arising during said deposition shall be referred to Judge Frankel; ordered that upon the terms and conditions set forth above, defendant's motion to adjudge said witness in contempt be denied without prejudice to renewal thereof on or after 8/4/71. Frankel, J. (mailed notice).	
7 29-71	Filed Order adjourning the return date of the subpoena duces tecumto 8/4/71; ordered that any questions arising during said deposition shall be referred to Judge Frankel,etd. Frankel, J. (mailed notice).	
8 .10-71	Filed Affidavit of Robert M. Trien (in connection with a proposed order).	
8 .12-71	Filed Affidavit of Robert M. Trien in further oppbsition to application of deft to hold David Gilbert in civil contempt.	
8 .12-71	Filed ORDER that David D. Gilbert shall produce documents; ordered that any questions arising during said deposition shallreferred to the Hon. Gregory Potter, United States Magistrate; Ordered that the motion of Consolidated Foods Corp. to adjudge the witness David D.Gilbert in contempt of court is referred for hearing on 8/31/71 at 10 AM before Hon.Gregory Potter, U.S.Magistrate, at ROOM 10, to receive evidence and report his recommendations to the undersigned with all possible speed. Frankel,J.(mailed notice).	
9 9-71	Filed Deposition of Henry Cohen -mailed notice.	
9 13-71	Filed deft's notice to take deposition of Frank Taub & Diane Levine	
11 8 71	Filed Pltff's notice to take deposition of Webco Mills Inc. on 11-22-71.	
11 8 71	Filed Pltff's notice to take deposition of Blue Ridge-Winkler Textiles Div. of Lehigh Valley Industries Inc. on 11-19-71.	
11 11 71	Filed Deft's NOTE OF ISSUE & Statement of readiness.	
11 19 71	Filed Pltff's objections to note of issue.	
11 23 71	Filed Pltff's notice to produce.	
11 29 71	Filed Deft's objections to notice to produce.	
11 23 71	Filed Deposition of Annice Gilbert on 11-19-70	
12 2-71	Filed affidavit of J.B. Swire in support of note of issue.	
12-11-71	Filed Transcript of record of proceedings, dated 8-4-71.	
12 16 71	Filed Deft's Answer to pltff's interrogs.	
12 27 71	Filed Memorandum in support of deft's claim for damages incurred by reason of the witness David Gilbert's contempt.	
1-7 72	Filed Deft's Notice to resume the deposition of David Gilbert on Jan 20 1972.	
1-28 72	Filed Stip & Order that pltff's objections to note of issue filed by deft on 11-10-71 now scheduled to be heard 2-2-72 is adj. to Feb 9 1972. So Ordered-	
FEB [illegible]	Filed Stip & order that pltff's objections to note of isue filed by deft, scheduled to be heard on 2-14-72 are adj. to 2-28-72-So ordered-Motley,J	

SEE NEXT PAGE

ATE	PROCEEDINGS	Date Ord Judgment
FEB 15 72	Filed Supplemental Affdvt of James B. Swire in support of Note of Issue.	
FEB 28 72	Filed MEMO ENDORSED on Objections to N/I filed 11-19-71, "Withdrawn subject to stipulation to be Filed before March 6 1972. So Ordered- Motley J." m/n	
MAR 3 72	Filed Pltff's notice of motinn ret. 3/16/72, for discovery & inspection. Memo annexed.	
MAR 9 72	Filed Stip & Order that pltff's objections to the note of issue filed by deft 11-11-71 are hereby withdrawn, without prejudice to pltff's rights as indicated. So Ordered- Motley J.	
MAR 10 72	Filed Deft's affdvt & notice of motion for an order striking pltff's motion entitled "Notice of motion to compel discovery", now ret. 3/16/72.	
MAR 10 72	Filed Memorandum of law in support of motion filed this day.	
MAR 15-72	Filed stipulatinn that pltff's motion to compel discovery ret. 3-16-72 & deft's motion ret. 3-16-72 are bothadjourned to 3-23-72	
MAR 21 72	Filed Affdvt of James Swire, atty for deft in opposition to motion to compel discovery.	
MAR 21 72	Filed Deft's memo in opposition to motion to compel discovery.	
MAR 22 72	Filed Stipulation that the pltff's motion to compel discovery now scheduled for Mar. 23 1972 and deft's motion to strike pltff's aforesaid motion, now scheduled on Mar. 23 1972 be and are both adjourned until Apr. 6 1972.	
MAR 30 72	Filed Special Master's Report submitted by Gregory J Potter.	
APR 10-72	Filed MEMORANDUM---Court approves fully the formulation of the basic issue by the Magistrate & his resolution. Only point of difference is as to atty's fees. Court holds that counsel fees in the amt. of $2,000 should be awarded. In addition, deft will recover its disbursements of $394.24. Settle judgment on notice holding the witness Gilbert in contempt & awarding deft sum of $2,394.24 in costs & counsel fees-Frankel,J	
APR 10-72	Filed Letters of Rogers,Hodge & Hills to Gregory Potter, the Clerk & Frankel,J.	
APR 10-72	Filed Motion of Witness, David Gilbert to reject recommendation of Special Master	
APR 10-72	Filed deft's motion to reject in part, modify & confirm in part the special master's report	
APR 10-72	Filed deft's memorandum in support of its motion to reject in part, modify & confirm in part the special masters report	
APR 10-72	Filed deft's Post-Hearing Memorandum in support of motion to hold non-party witnesses in contempt	
APR 10-72	Filed David Gilbert, a witness, memorandum in support of an application to reject the recommendation of Magistrate Potter to hold the witness in contempt of Court	
APR 10-72	Filed David Gilbert's memorandum in opposition to claim for damages for alleged contempt	
APR 10-72	Filed David Gilbert's post-hearing memorandum in opposition to application to hold Gilbert in civil contempt	
APR 10-72	Filed Transcript of Record of Proceedings dated 9-17-71	
APR 6-72	Filed stip. that pltff's motion to Compel Discovery and deft's motion to Strike pltff's motion, is ext. from 4-6-72 to 4-27-72.	
APR 24-72	Filed Letter of Philip Handelman dated 4-18-72 to Frankel,J re to reargue motion to reject Magistrate's Report	
APR 24-72	Filed Letter of Rogers,Hoge & Hills dated 4-19-72 to Frankel,J.to deny request for reargument	
APR 24-72	Filed MEMORANDUM & Order---The direction to settle a judgment is vacated. Matter is remanded to Magistrate Potter to reopen the record & receive the testimony of Mr. Handelman. Upon the conclusion of that reopened hearing, the Magistrate should report in detail his findings as to the state of Mr. Gilbert's knowledge at the relevant times & the detailed evidentiary basis for such Findings-So ordered-Frankel,J m/n	

SEE OTHER SIDE.

DATE	PROCEEDINGS	Date Judgm
Apr 24 72	Filed Letter from Rogers, Hoge & Hills to Frankel, J. dtd 4/21/72.	
Apr 24-72	Filed deposition of Franklin P. Taub taken by deft on 9-30-71 m/n	
May 1-72	Filed Notice of taking Deposition of Curtin Hebert Co.	
May 17-72	Filed ~~EXXXX~~ Affdvt of Webco Mills, Inc. a witness	
May 17-72	Filed affdvt of Arthur S. Olick	
May 17-72	Filed memorandum in support of deft's motion to reject in part the report and recommendation of the Magistrate	
May 17 72	Filed MEMO ENDORSED on motion filed Mar. 6, 1972. "*** Ordered that the Magistrate's Report is confirmed and the motion is granted as indicated." So Ordered - McLean J. m/n	
May 17 72	Filed Report & Recommendation submitted by Gerard L. Goettel, US Magistrate.	
May 17 72	Filed Deft's motion to reject in part Magistrate's Report and recommendation.	
May 17 72	Filed Memo Endorsed on motion filed above this day, "Motion denied - so ordered. McLean J." m/n	
May 17 72	Filed Memo Endorsed on motion papers filed Mar. 10 1972, "Motion denied. So Ordered. McLean J." m/n	
MAY 17 72	Filed Affirmation by Robt. M. Trien, for the pltff, in opposition to application of the deft to reject in part, the Report of Magistrate Gerard L. Gottel dtd May 4 1972.	
MAY 17 72	Filed Memo Endorsed on affirmation filed this day, "Motion to award costs denied, So Ordered- McLean J. m/n	
JUL 13 72	Filed Special Master's Report by Gregory J Potter.	
AUG 9 72	Filed ORDER that the testimony of Philip Handelman, Esq., be retaken before Gregory J Potter, US Magistrate, purs. to order made on Apr. 21 1972, upon a transcript to be provided in the usual way through the services of the court reporter. Frankel J. m/n	
Oct.18-72	Filed Notice of filing U.S.Magistrate Gregory J.Potter's Report as Special Master. and Special Master's REPORT.	
Nov.10-72	Filed transcript of Record of Proceedings of Oct. 10, 1972 before Magistrate Potter.	
Nov.10-72	Filed Supplemental Memorandum in support of an application to reject the recommendation of Magistrate Gregory Potter.	
Nov.10-72	Filed MEMORANDUM and ORDER. The Court has concluded not to grant an increase in counsel fees. The counter-suggestion of Gilbert for a decrease is frivilous. SETTLE A JUDGMENT ON NOTICE, pur. to this memorandum and the one dated 4/10/72 awarding defendant $2,394.24. Frankel, J.(mailed notice).	
Nov.22-72	Filed JUDGMENT. Ordered that the witness David D. Gilbert is in contempt of this Court, and deft. Consolidated Foods Corp. recover of said witness the sum of $2,394.24, as costs and counsel fees and unless payment is made within 30 days after entry hereof, the U.S.Marshal SDNY is directed to take into his custody the person of David D. Gilbert and commit him to the Federal House of Detention, New York until such time as he shall purge himself of said contempt by paying the defendant the sum specified,etc.etc. Frankel, J. Judgment ent. 11/27/72. Ent. 11/29/72. (mailed notice). DOCKETED AS JUDGMENT #72,995.	
12-12-72	Filed date 12-4-72	
Dec20-72	Filed Notice of Appeal of David D. Gilbert from Judgment dtd 11-20-72. and was entered in this action 11-22-72. Mailed copies.	
Dec26-72	Filed Notice of Appeal of Consilidated Foods Corp from judgment dtd 11-27-72. Mailed copies.	
Dec.20-72	Filed Supercsedeas Bond ($2,644.24 Fidelity and Deposit Co. of Maryland).	
Feb.15-73	Filed stipulation for dismissal of appeal and cross-appeal.	
Apr 2-73	Filed Satisfaction of Judgment # 72,995	
Feb.28-74	Filed deposition of Diane Levine.	
May 22-74	Filed defts. notice of motion to amend answer, Ret. 6-7-74.	
May 22-74	Filed deft's. memo in support of motion to amend.	

Con't on Page #4

70 Civ. 4536 ANNICE GILBERT -v- CONSOLIDATED FOODS CORP. 70 Civ. 4536

5a

CIVIL DOCKET PAGE # 4 LASKER, J.

DATE	FILINGS—PROCEEDINGS	ACTION REPORTED OR DOCUMENT RETURNS
Jun.6-74	Filed pltffs affdvt in opposition to motion to amend answer.	
Jun.6-74	Filed pltffs memo in opposition to deft's motion to amend its answer.	
Jun.11-74	Filed deft's reply memo in support of motion to amend pleadings.	
Jun 12,74	Filed Memo-End. on back of notice of motion filed 5-22-74.--Respectfully referred to Mag. Gerald L. Goettel of this Court for review and recommendation. -----Lasker, J.	
Jun 24-74	Filed U.S. Mag. Goettel's Report & Recommendation...Deft. moves to amend its answer...Pltff objects to the amendment...Consequently, uless allowing the amendment would interfere with the court's trial schedule, I recommend allowing the amendment...Respectfully, G.L. Goettel U.S. Mag.	
Jul 1-74	Filed Memo-End. on back of motion filed May 22-74...The annexed motion to amend is granted on the basis of the reason set forth in the Report & recommendation of Mag. Gottel dated 6-21-74(filed 6-24-74)..Lasker, J. m/n	
Nov.13-74	Filed deposition of Lari Stanton taken on 8/26/71,9/28/71,11/9/71, 1/12/72	
Nov.13-74	Filed deposition of Blue Ridge-Winkler Textiles Div. of Lehigh Valley Indus. by Rubin Kantrowitz - 1/11/72	
Nov.13-74	Filed deposition of Webco Mills, Div. of Dan River,Inc. by Nathaly O. Robbins	
Nov.13-74	Filed deposition of Lawrence Kramos on 2/7/72	
Dec 6-74	Filed transcript of record of proceedings, dated Aug 24, 1971	
Dec 9-74	Filed transcript of record of proceedings, dated Jan. 20. 1972	
Dec 9-74	Filed Deposition of David R. Gibert dated 1-25-71.	
Dec 16-74	Filed Deposition of Gala Gamble taken on 12-5-74. m/n	
5-19-75	Filed transcript of record of proceedings, dated Jan. 17, 1975	
5-19-75	Filed transcript of record of proceedings, dated Dec. 16,17,18,19 1974, Dec 23,24,1974	
5-21-75	Filed Memorandum#42450....For the reasons stated above, wer find that the deft. is liable to Mrs. Gilbert for the reasonable value of her services in advising Aris in connection with the development and promotion of the "Hands Beautiful" and "IsoToner" gloves, but the deft. is not liable otherwise. The Court will fix a date for trial as to damages. Lasker,J. mn	
8-7-75	Filed Pltff's Memo in support of motion to amend Findings of Fact & Conc. of Law.	
8-7-75	Filed Pltff's Notice of Motion for an order to amend Finding of Fact & Conc. of Law....ret 8-18-75....at 10 AM Rm 1903.	
8-12-75	Filed Order that pltff's motion to amend the Court's findings of fact and conclusions of law, now ret. 8-18-75 is adj to 9-12-75..Lasker,J. mn	
9-15-75	Filed Deft's Memo in opposition tomotion to amend findings of fact & conclusions of law.	

D. C. 110

DATE	PROCEEDINGS	AMOUNT REPORTER IN ENCLUMENT RETURNS
10-15-75	Filed Memo End on back of Moti n filed 8-7-75...Pltff's motion to amend the findings of facts and conclusions of law is denied...~~xixxi~~ It is so Ordered. Lasek, J. mn	
11-09-75	Filed Transcript of proceeding dtd. 9-3-75.	
3-17-76	Filed Opinion #44070 - That Deft. is liable to the Pltff. in the sum of $12,000 plus interest from 9-18-69. Submit judgment on notice.....Lasker,J. (mailed notice)	
04-09-76	Filed Judgment #76,314 - Ordered that Pltff. recover of Deft. the sum of $12,000.00 plus interest totaling the sum of $17,248.00.....Lasker,J. Judgment Entered 4-12-76.....Clerk. Entered 4-13-76. (mailed notice)	
05-10-76	Filed Pltff's. notice of appeal from the judgment entered 4-12-76. (mailed notice)	
05-21-76	Filed Deft's. notice of cross-appeal from the decisions dated 5-21 and 10-14, 1975 and 3-16-76 and from the final judgment entered on 4-12-76, which grant Pltff. relief herein. (mailed notice)	
06-04-76	Filed copy of U.S.C.A. scheduling order.	
06-04-76	Filed transcript of record of proceedings dated 1-29-75.	
07-13-76	Filed notice of certification & transmittal of the record on appeal to the U.S.C.A.	
7-12-76	Filed pffs post trial memo	
7-12-76	Filed removal bond in amt of $500.00 (National Surety Co.)	
7-12-76	Filed pffs post trial memo	
7-12-76	Filed defts pre trial memo	
08-31-76	Filed transcript of record of proceedings Dated 1-29-75	
9-30-76	Filed copy of USCA order dismissing appeal as to pltff appellant Annice G.	

10-15-75	Filed Memo Ord on back of Motion filed 8-7-75...Pltff's motion to amend the findings of facts and conclusions of law is denied...~~xtt~~ It is so Ordered. Lasker,J. mn
12-09-75	Filed Transcript of proceeding dtd. 9-3-75.
03-17-76	Filed Opinion #44070 - That Deft. is liable to the Pltff. in the sum of $12,000 plus interest from 9-18-69. Submit judgment on notice.....Lasker,J. (mailed notice)
04-09-76	Filed Judgment #76,314 - Ordered that Pltff. recover of Deft. the sum of $12,000.00 plus interest totaling the sum of $17,248.00.....Lasker,J. Judgment Entered 4-12-76.....Clerk. Entered 4-13-76. (mailed notice)
05-10-76	Filed Pltff's. notice of appeal from the judgment entered 4-12-76. (mailed notice)
05-21-76	Filed Deft's. notice of cross-appeal from the decisions dated 5-21 and 10-[illegible], 197[illegible] and 3-16-76 and from the final judgment entered on 4-12-76, which grant Pltff. relief herein. (mailed notice)
06-04-76	Filed copy of U.S.C.A. scheduling order.
06-04-76	Filed transcript of record of proceedings dated 1-29-75.
07-13-76	Filed notice of certification & transmittal of the record on appeal to the U.S.C.A.
08-31-76	Filed [illegible] record of proceedings dated 1-29-75
9-30-76	Filed copy of USCA order dismissing appeal as to pltff appellant Annice G [illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNICE GILBERT,

Plaintiff,

v.

CONSOLIDATED FOODS CORP.,

Defendant.

70 Civ. 4536(MEL)

JUDGMENT

#176,314

This action having comeon for trial before the Court, Honorable Morris E. Lasker, United States District Judge, presiding, on December 16, 17, 18, 19, 23, 24, 1975 and January 17 and September 3, 1975 and the Court having rendered its decision by memorandum opinions dated May 21, 1975, October 14, 1975 and March 16, 1976,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff Annice Gilbert recover of the defendant Consolidated Foods Corp. the sum of $12,000, with interest thereon at the rate of 7 1/2 per cent per annum from September 18, 1969 to September 1, 1972, amounting to $2,653.00 and interest at the rate of 6 % per annum from September 1, 1972 to April 9, 197 (the date of Judgment) amounting to $2590, totaling the sum of $17,243.00 together with costs to be taxed by the Clerk upon notice.

Dated: New York, New York
April 9 1976

U.S.D.J.

JUDGMENT ENTERED - 4/12/76

BEST COPY AVAILABLE

RECEIVED
MAY 23, 1971 DOCKETED
BY MAIL PLEADINGS
ROGERS, HOGE & HILLS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

ANICE GILBERT,

Plaintiff,

-against-

CONSOLIDATED FOODS CORP.,

Defendant.
----------X

70 Civ. 4536

MEMORANDUM

APPEARANCES:

PHILIP HANDELMAN, ESQ.
360 Lexington Avenue
New York, New York 10017
Attorney for Plaintiff

ROGERS, HOGE & HILLS, ESQS.
90 Park Avenue
New York, New York 10016
Attorneys for Defendant

LASKER, D.J.

Anice Gilbert sues for breach of contract and breach of trust and confidential relationship with respect to an idea, or package of ideas, allegedly disclosed by her pursuant to a written agreement with Aris Gloves, Inc. ("Aris"). She seeks recovery of the value of her idea, an accounting of defendant's profits, and punitive damages in the amount of $250,000. The defendant, Consolidated Foods Corporation, acquired Aris, which now does business as the Aris Gloves Division of Consolidated. The issue of liability was tried to the court. The following are our findings of fact and conclusions of law.

Lari Stanton has been President of Aris since 1960 (2).[1/] From approximately 1962 until sometime after the filing of this action, Stanton took yoga lessons from David Gilbert, the plaintiff's husband (507). In the course of their relationship, Stanton became friendly both with Mr. Gilbert and his wife and met the two of them often for dinner and on other occasions (9, 510).

Prior to 1968 Mrs. Gilbert had had some experience in design, both at school and as a free-lance worker. She had occasionally mentioned to Stanton ideas regarding glove designs (5,8-11). One of the ideas which Mrs. Gilbert gave Stanton prior to March 30, 1968 was to manufacture a "night mitten" which she claimed would massage the hands, possibly

diminish skin spots, increase circulation, whiten the hands, and compress the veins (472). Stanton asked Mrs. Gilbert to prepare some designs for him, but she did not because she and Stanton were unable to agree on the price Aris was to pay for them (9, 379). Thus, as of March 30, 1968, neither Stanton nor Aris had ever made any payment to Mrs. Gilbert for ideas to be used in Aris' glove business.

However, immediately prior to March 30, 1968, Mrs. Gilbert told her husband that she had an idea for Stanton, which she would reveal only after receiving assurance by Stanton that she would be compensated for its use. Mr. Gilbert conveyed this information to Stanton and an appointment was arranged (7, 10). On March 30, 1968, Mr. and Mrs. Gilbert met Stanton for dinner at the Right Bank Restaurant in New York (389). At the restaurant Mrs. Gilbert told Stanton that she had an idea for his business but would not disclose it unless she had "something in writing" to guarantee that she would be compensated should Stanton use the idea (390). On the spot Mr. Gilbert drafted a document which was signed by Stanton and which reads:

> "Right Bank Restaurant March 30, 1968
>
> I, Lari Stanton, of 36 E. 36th St., Pres. of Aris Gloves -- in the presence of witnesses -- agree not to manufacture or reveal to anyone for a period of five years -- the item of confidence that Anice P. Gilbert -- will reveal to me -- and agree that this item is her's solely having originated with her -- is her sole

property -- and should I find this item (Gilbert's) to my interest -- I will manufacture it -- and give her reasonable return -- for her idea.

/s/ Lari Stanton (signature)
Lari Stanton
Pres. Aris Gloves" (Ex. 1)

After Stanton signed the document, Mrs. Gilbert revealed the idea, which was to manufacture "fashion"gloves from a lycra spandex material, of the kind used in certain women's girdles. She stated that the fabric would benefit and could be advertised to benefit the hands of the wearer cosmetically and therapeutically by creating a massaging action on the hands, depressing and flattening the veins, increasing blood circulation, and keeping the skin smooth, white and flat (392). Mrs. Gilbert also suggested that the fabric could be used for other products such as body suits, stockings, facial masks and socks, and that such products would have similar beneficial effects (393).

In May, 1968 Mrs. Gilbert and Stanton began to discuss drawing up a formal agreement (405) and in May and October, 1968 Mrs. Gilbert's lawyer, on her instructions, prepared drafts of a contract between Mrs. Gilbert and Aris by the terms of which she would be paid a royalty for gloves made by Aris from lycra spandex. (Ex. 91 and 92) Stanton, however, refused to sign either document. Mrs. Gilbert also asked Stanton to guarantee her an 8% royalty on any product manufactured by him which embodied her idea,

but the parties never executed an agreement for the payment of royalties (401-420). Despite Stanton's unwillingness to consummate an agreement with Mrs. Gilbert, he constantly told Mrs. Gilbert that Aris was developing the manufacture and promotion of lycra spandex gloves and that/"I will always be fair to you. Don't worry." (79)

While Stanton had not at the March 30th meeting or thereafter ever disparaged Mrs. Gilbert's idea or its originality, he was hardly a stranger to lycra spandex, its characteristics, or its potential use in the glove trade. In 1959, E.I. DuPont deNemours & Company began to market its lycra spandex fiber. Stanton became aware of the material and its special features such as the ability to stretch and to support long before March 30, 1968 (225). He also knew (by 1965) of the existence of lycra stockings sold under the "Supp-Hose" brand name (233). Furthermore, William Winkler, the President of Blue Ridge-Winkler Textiles (BlueRidge), one of Aris' material suppliers, showed Stanton samples of lycra spandex fiber in September or October, 1965, and suggested that a fashion glove be made from the fabric and promoted as a sort of "Supp-Hose for the hands" which would help circulation, reduce hand fatigue and generally do for hands what "Supp-Hose" does for legs (233, 333). Because of deficiencies in the fabric's appearance, Aris did not make gloves from the material at

that time (689). However, during the years 1964 to 1968, Blue Ridge sent to Stanton any lycra spandex material it developed (226, 230, 699-700, 714, 715, 717, 718, 735). While no gloves were manufactured from the material, Stanton asked Blue Ridge to continue experimentation (734).

The Webco Division of Dan River Mills also began to market lycra spandex fabric in 1964-65 (892, 893). In December, 1967 or January, 1968, Henry Cohen, a salesman for Blue Ridge, saw lycra spandex stretch fabric at Webco in a shocking pink color. He took a sample of the material from Webco and showed it to Stanton, suggesting that Aris make gloves from it (50, 61, 85, 234, 964, 966, 967). Shortly thereafter Cohen arranged for a sample glove to be made from the material (129, 982, 993) and presented it to Stanton who then became seriously interested in the possibility of manufacturing gloves from the material (822). Stanton asked Cohen if Aris could obtain an exclusive on the material (51, 967, 968). Through Cohen's efforts, prior to March 30, 1968, Webco gave Aris the exclusive right to manufacture gloves from its lycra spandex (126, 998). The agreement was formalized in writing on October 21, 1968 (Ex. 29).

Early in 1968, prior to the March 30th meeting between Stanton and the Gilberts, Stanton wrote to Somark Gloves, a company which manufactured gloves for Aris (64,

801), requesting Somark to make a sample glove from Webco's shocking pink lycra spandex (61, 85, 128, 236, 789, 791, 798, 803, 812, 821, 829).

The normal period of development between the initial making of a glove sample and the order of material in quantities sufficient for production is approximately one to six months (898). The period necessary to produce a marketable glove from lycra spandex was greater than normal because of the manufacturing problems presented by the tendency of the material to curl (815, 816, 906).

Somark made the first sample shocking pink glove for Aris six to seven weeks after receiving Stanton's letter (811). Somark was working on the manufacture of samples at the time of the March 30th meeting between Stanton and the Gilberts (811). By March 30th Somark had used up the first piece of lycra spandex sent by Aris, and Aris sent a second piece so that Somark could continue experimentation (817, 851). On April 17, 1968, Stanton wrote to Somark asking why samples of the shocking pink lycra spandex gloves had not been delivered as requested. (Ex. 25, 797). Mrs. Gilbert was herself shown some of the glove samples in April (485).

By April or May, 1968, Somark had overcome most, if not all, of the problems involved in producing a satisfactory glove (820-21), and made its last sample of lycra

spandex gloves for Aris in June, 1968 (837).

On May 6, 1968, Aris ordered lycra spandex material in quantities sufficient for commercial production (67, 892-3, 901, Ex. 27), and on June 20, 1968, Somark received the first shipment of this material from Webco (Ex. 108, 795, 818). The material was, and had been during the period of development, the same Webco fabric shown to Stanton by Henry Cohen (245). Aris' first shipment of lycra spandex gloves to a customer for retail sale occurred September 18, 1969 (Ex. 50, 136, 1016).

During the period of experimentation described above, Stanton periodically discussed the glove with the Gilberts, sought their comments about its design (47, 48, 49, 96, 99, 425), and in general kept them informed about the product's progress (38, 532-3). More than once Stanton gave samples to Mr. Gilbert who then showed them to his wife (102).

In the summer or fall, 1969, Aris began advertising the glove (31, 136). The advertisements claimed that the gloves helped to reduce large veins; made hands look younger, smoother and prettier; massaged the hand; tended to cause blemishes to disappear; and might induce nails to grow longer (Ex. 5-10).

These claims were not novel in the glove and hosiery industry. Well before March, 1968, Fling, a

hosiery company, advertised that its support hose would relieve fatigue, and would soothe and relax the legs like a massage (Ex. 000-WWN). Before 1968, Stanton knew that such claims were being generally made by hosiery manufacturers (257, 1007). Moreover, before the commencement of Aris' advertising campaign, Supp-Hose advertised that its lycra stockings were the "perfect answer" for women with mild varicosities; gave "faithful support," relieved leg fatigue and comforted the legs. (Ex. AA, CC,EE). Of particular interest is the fact that in the early 1950's Acme Glove Corporation had advertised its "beautyskin" gloves as keeping hands smooth, white and youthful and by 1951, Stanton knew of these claims (1005, 1006). Indeed, in 1948 and 1949, Aris itself had manufactured a glove that it promoted as having a soothing effect on the hands (41).

During the period that Aris was developing its promotional materials, Stanton discussed his advertising ideas with the Gilberts on approximately twelve occasions (45, 46, 169). Mr. Gilbert and sometimes Mrs. Gilbert, advised Stanton, at his request, of their reactions to proposed advertising and packaging plans (69, 139, 166, 167). The Gilberts also attended press parties for promotion of the gloves and, at least during one of them, helped Stanton by circulating among the guests to stir up enthusiasm for the product (461, 561). Both Gilberts also

suggested to Stanton possible names for the gloves (433, 449) which was marketed under the trademark names IsoToner and Hands Beautiful (33).

Aris has, from September 1969 to date, manufactured and continues to manufacture and sell various gloves of lycra spandex stretch fabric in substantial volume under the trademarks "Hands Beautiful" and "IsoToner." Aris has also marketed a stretch body suit (in November, 1970) (288), a chin strap (in the early part of 1971) (291), an eye strap (in or about 1971) (288), and panty-hose (in November 1970) (288), all made from lycra spandex material. The body suit stemmed from an idea of Mr. Gilbert's to combine sale of a cream with a stretch body suit (121). Stanton discussed this product with Mr. Gilbert, but not with Mrs. Gilbert (76).

On the basis of these facts, Mrs. Gilbert asserts that she is entitled to compensation of 8% of Aris' sales of Hands Beautiful gloves or, alternatively, the reasonable value of the ideas revealed to Stanton on and after March 30, 1968. Her royalty claim is based on the agreement of March 30, 1968. The defendant argues that the agreement is fatally indefinite; void under the New York Statute of Frauds; unenforceable because use of some of Mrs. Gilbert's promotional ideas would have been illegal; and lacking in consideration. We need not, and do not,

reach the latter two points because we agree with Aris that the March 30th agreement fails to state the terms of compensation with the specificity required under New York contract law.

As noted above, the agreement provided that should Stanton

> "find this item (Gilbert's) to my interest -- I will manufacture it -- and give her reasonable return -- for the idea."

While Mrs. Gilbert attempted to extract from Stanton a promise to fix that return at 8% of sales, the parties never specified such compensation orally or in writing. The claim for a royalty, therefore, fails because since its payment would have extended beyond one year it could not be enforced unless in writing, N.Y. Gen. Ob. Law §5-701 (1). This leaves the question whether Mrs. Gilbert can recover under the provision of the March 30, 1968 agreement. Such a provision has been held unenforceable for vagueness under New York Law. Varney v. Ditmars, 217 N.Y. 223, 228 (1946) ("a fair share of my profits"); Bloemner v. Garvin, 120 App. Div. 29, 104 N.Y.S. 1009 (1907) ("fair share of commissions"); Mackintosh v. Kimball, 101 App. Div. 494, 92 N.Y.S. 132 (1905) ("satisfactory amount"); Mackintosh v. Thompson, 58 App. Div. 25, 68 N.Y.S. 492 (1901) ("satisfactory amount').

However, as the court noted in Varney:

> "In the case of a contract for the sale of goods or for hire without a fixed price or consideration being named, it will be presumed that a reasonable price or consideration is intended and the person who enters into a contract ... is liable ... as on an implied contract."

In Varney, 217 N.Y. at 228, the court allowed recovery on quantum meruit by a party who had performed in reliance on the contract terms. Accord, Bialostok v. Wilson, 191 Misc. 385 (1948); United Press v. N.Y. Press Co., 164 N.Y. 406, 412 (1900). A similar recovery is appropriate here. That as of March 30, 1968 Mrs. Gilbert was no longer willing to give Stanton business suggestions for nothing is evident from her refusal to divulge her idea without a written agreement; and that Stanton was willing to pay for her services is evidenced not only by his signing the March 30th document but also by his consistent reassurances that he would be "fair" to Mrs. Gilbert.

We turn, then, to a consideration of the items for which Mrs. Gilbert is entitled to be compensated and for which compensation is due her. This determination must be made by reference to the expectations of the parties as to what Mrs. Gilbert was to give Stanton in light of the March 30th agreement. The contract referred to "an item of confidence" that had "solely -- originated with her [and] is her sole property." The clear import of its language

is that Stanton bargained for, and was willing to pay for ideas, but only for ideas that were conceived by Mrs. Gilbert, novel to Stanton and actually used by Aris.

Mrs. Gilbert's suggestion of a lycra spandex glove does not fit the test. The idea was not novel to Stanton. Not only had Stanton been aware of lycra spandex's possible use in gloves as a result of his dealings with Blue Ridge and Winkler Textiles in the mid-1960's but, prior to March 30, 1968, he had actually received from Henry Cohen a glove sample of the very type of lycra spandex used in the Hands Beautiful glove. The development process of the glove was well under way by the time Mrs. Gilbert revealed her idea. Thus, while it may have been novel to Mrs. Gilbert, it was not to Stanton.

Nor can Mrs. Gilbert recover for the advertising claims that the glove would, among other wonders, massage hands, compress veins and increase circulation, for she herself admitted that she had disclosed these ideas to Stanton (in connection with the "night mitten") before the March 30, 1968 dinner meeting and without demand or expectation of compensation./ (472) Mrs. Gilbert's claims as to other possible end products which could be made from lycra spandex fare no better. While Aris did manufacture a body suit, the evidence establishes that the suggestion to do so was Mr. Gilbert's, not his wife's, (76,121) and/the idea that

for panty-hose was anything but novel, given the presence on the market well prior to March, 1968, of Fling stockings and Supp-Hose. Finally, Mrs. Gilbert cannot recover for the idea of the facial mask, since Aris never marketed one.

On the other hand, the defendant is liable to Mrs. Gilbert for her continual advice to Stanton throughout the development and promotion of the glove, advice which Stanton solicited and often used, and which was given by Mrs. Gilbert in clear reliance on Stanton's March 30th promise to compensate her. While the March 30, 1968 agreement may be unenforceable, it is the strongest evidence that Mrs. Gilbert expected to be remunerated for any future business suggestions she made to Aris. Having solicited her services in circumstances in which she had a right to rely on the expectation of being paid, Stanton bound Aris and its successor to compensate her for their use. Implicit in all contracts, written or implied, is an implied covenant of fair dealing and good faith. Van Valkenburgh v. Hayden Pub. Co., 30 N.Y. 2d 34, 45 (1972); Gordon v. Nationwide Mut. Ins. Co., 30 N.Y. 2d 427, 437 (1972). Stanton breached that covenant and under the circumstances, declining to award damages for such services would unjustly enrich the defendant at Mrs. Gilbert's expense. Underhill v. Schenck, 238 N.Y. 7, 13-15 (1924) (Cardozo, J.).

But while Stanton's conduct toward Mrs. Gilbert may not have been the most honorable, it in no way approaches the degree of fraud and "high moral culpability" necessary to support a claim for punitive damages under New York Law. Walker v. Sheldon, 10 N.Y.2d 401, 404-405, 223 N.Y.S. 2d 488 (1961); see also Caldwell v. New Jersey, 47 N.Y. 282, 296 (1872); Cleghorn v. New York Cent. & H.R.R.R., 56 N.Y. 44, 48 (1874); Soucy v. Greyhound Corp., 27 A.D. 2d 112, 113, 276 N.Y.S. 2d 173, 175 (3d Dept. 1967); Noonan v. Luther, 119 App. Div. 701, 104 N.Y.S. 684 (3d Dept. 1907).

For the reasons stated above, we find that the defendant is liable to Mrs. Gilbert for the reasonable value of her services in advising Aris in connection with the development and promotion of the "Hands Beautiful" and "IsoToner" gloves, but the defendant is not liable otherwise.

The Court will fix a date for trial as to damages.

Dated: New York, New York
May 21, 1975.

Morris E. Lasker
U.S.D.J.

FOOTNOTE

1. Numbers in parentheses refer to trial transcript pages.

ENDORSEMENT

JANICE GILBERT, Plaintiff, v. CONSOLIDATED FOODS CORP., Defendant. 70 Civ. 4536

LASKER, D.J.

Plaintiff's motion to amend the findings of fact and conclusions of law is denied.

The findings of fact are not against the weight of the credible evidence. There is no rule of law which requires a court to accept or reject in toto the testimony of any witness and there is ample documentary evidence to support the conclusions reached. Having observed and assessed the credibility of all witnesses, we refuse to discredit the testimony of all witnesses who were called on behalf of the defendant simply because plaintiff argues that they were all "friendly or beholden" to Aris Gloves or Stanton; but even if we were to discount their testimony because of possible partiality, we would nevertheless believe that plaintiff had failed to meet her burden of proving by a preponderance of the evidence that her ideas originated solely with her.

We also disagree with Mrs. Gilbert that "The question is not whether every part of her idea was new but whether the idea as a package was valuable to Stanton, and whether he acted upon it." (Memorandum at p. 24) As stated in our earlier opinion, the words of the contract itself reveal that Stanon bargained for an idea that "solely ... originated with [Mrs. Gilbert]." (Ex. 1) Therefore, even if Mrs. Gilbert "sparked" Stanton to begin manufacturing the Hands Beautiful glove and to embark on a major advertising campaign, Mrs. Gilbert cannot recover for the value of the idea itself because Stanton already knew of and had begun work on a glove made of lycra spandex which could be advertised as having therapeutic effects. The cases which plaintiff cites are inapposite because the contracts in those situations, unlike the one in the present case, did not expressly require that the idea originate "solely" with the plaintiff.

It is so ordered.

Dated: New York, New York
October 14, 1975.

MORRIS E. LASKER
U.S.D.J.

RECEIVED
OCT 15, 1975
BY MAIL
ROGERS, HOGE & HILLS

DOCKET
PLEADINGS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

ANICE GILBERT,

Plaintiff,

70 Civ. 4536

-against-

CONSOLIDATED FOODS CORP.,

MEMORANDUM

Defendant.
----------X

APPEARANCES:

PHILIP HANDELMAN, ESQ.
360 Lexington Avenue
New York, New York 10017
Attorney for Plaintiff
Of Counsel: ROBERT M. TRIEN, ESQ.

ROGERS, HOGE & HILLS, ESQS.
90 Park Avenue
New York, New York 10016
Attorneys for Defendant
Of Counsel: MERCER L. STOCKELL, ESQ.
JAMES B. SWIRE, ESQ.

LASKER, D.J.

Anice Gilbert sues Aris Gloves, Inc. (Aris) for damages with respect to an idea for manufacturing a fashion glove from lycra spandex material and for promoting the glove as having certain cosmetic and therapeutic benefits. Mrs. Gilbert bases her claim upon a written agreement and on Aris' breach of trust and confidential relationship.

A trial was held on the issue of liability. By memorandum dated May 21, 1975, the written agreement was held unenforceable for failure to state "the terms of compensation with the specificity required under New York law." (Memorandum, p. 10) However, Mrs. Gilbert was held to be entitled to recover on a quantum meruit basis for the services she performed and which were accepted by Aris. Specifically, it was found that plaintiff was not entitled to recover for the idea of a lycra spandex fashion glove because the idea was not novel; nor was she entitled to damages with respect to the advertising claims, because she had disclosed these ideas without demand or expectation of compensation. However, Aris was held liable to Mrs. Gilbert "for her continual advice to Stanton [president of Aris] throughout the development and promotion of the glove." (Memorandum, p. 13) This conclusion was based on findings that:

> "During the period of experimentation ... Stanton periodically discussed the glove with the Gilberts, sought their comments about its

> design, and in general kept them informed about the product's progress. More than once Stanton gave samples to Mr. Gilbert, who then showed them to his wife." (Memorandum, p.7) (transcript citations omitted)
>
> * * * * *
>
> "During the period that Aris was developing its promotional materials, Stanton discussed his advertising ideas with the Gilberts on approximately twelve occasions. Mr. Gilbert, and sometimes Mrs. Gilbert, advised Stanton, at his request, of their reactions to proposed advertising and packaging plans. The Gilberts also attended press parties for promotion of the gloves and, at least during one of them, helped Stanton by circulating among the guests to stir up enthusiasm. Both Gilberts also suggested to Stanton possible names for the gloves which was marketed under the trademark names Isotoner and Hands Beautiful." (Memorandum, pp.8-9) (transcript citations omitted)

A trial was subsequently held on the issue of damages. Plaintiffs presented three expert witnesses, Dr. Jules Backman, Mr. Gordon Zern, and Mr. Vernon Cowper. Defendants introduced the testimony of one expert witness, Mr. Donald Sheerin, and of Stanton.

On the basis of a hypothetical set of facts prepared by counsel for Mrs. Gilbert, her witnesses testified that the proper criterion for measuring damages was a royalty in the form of a set percentage of Aris' gross sales, (ranging from 5 to 10 percent) (Transcript, 85, 122), or a

percentage per unit sold (Transcript, 53). On the basis of a different hypothetical set of facts prepared by Aris, Sheerin testified that the appropriate arrangement in such a situation was an hourly fee. Although he noted that such fees usually ranged from ten to twenty dollars per hour during the years in question (1968-1969), Sheerin stated that he believed Mrs. Gilbert should receive a fee at the lower end of the scale.

We find that neither theory of recovery suggested by the parties is appropriate in the case at hand. Plaintiff's view that she is entitled to a percentage of gross sales is unacceptable. The witnesses who were called upon to give an opinion in her behalf were undeniably qualified in their fields. However, the hypothetical upon which their opinions were based did not conform to the findings of fact on the issue of liability. In particular, the hypothetical erroneously assumed that Mrs. Gilbert was a major, if not the primary engineer behind the development of the glove itself and the advertising and promotional campaigns undertaken in connection with the sale of the glove.

By memorandum dated October 14, 1975, plaintiff's motion to amend the findings of fact and conclusions of law was denied. In that opinion, it was restated that "Mrs. Gilbert cannot recover for the

value of the idea itself." At the trial on damages, when plaintiff's witness, Dr. Backman, was questioned on cross-examination as to his perception of Mrs. Gilbert's contribution, he stated:

> "... if I understood it correctly, what they were doing was to attempt to market the results of what Mrs. Gilbert had done." (Transcript, 72)

Plaintiff's second expert witness, Zern testified that:

> "... the impression I get from the [plaintiff's] hypothetical question is that here is a rather vague general possibility which nobody has developed, or nobody has recognized as an important marketing item. And at that point certain ideas were injected [by Mrs. Gilbert] which turned these ideas and developmental suggestions, et cetera, that developed this into a marketable product .... I am having trouble separating these things out, but I do recall that the original idea was mentioned in the hypothetical ...." (Transcript, 90-91)

Cowper, the third expert witness called by plaintiff, also testified that when he considered the appropriate basis for damages, he took into account the "total newness of the idea," (Transcript, 125) and that an important factor in reaching his opinion was the assumption that Mrs. Gilbert:

> "kept this thing in the forefront of the plans so that it emerged as an executive decision to emphasize it, to have the salesmen push it." (Transcript, 119)

This view of the matter is at odds with the findings set

forth in our memorandum dated October 14, 1975. There we rejected plaintiff's claim that she was entitled to recover for the value of the idea of a fashion glove made from lycra spandex because she "'sparked' Stanton to begin manufacturing the Hands Beautiful glove and to embark on a major advertising campaign." (Transcript, 125) Thus it appears that the assumptions upon which plaintiff's witnesses based their opinions were simply not in accord with the conclusions reached as to the basis of the recovery to which Mrs. Gilbert is entitled. Her services, while continuous, were not of the character assumed by these experts.

While we thus must reject the opinion of plaintiff's witnesses, it does not follow that the opinion of defendant's witness Sheerin, that Mrs. Gilbert be compensated on the basis of a ten dollar hourly fee, should prevail. Sheerin testified that a ten dollar rate was low in comparison to the general rate charged by free lance consultants at the time in question; but that it was a fair rate under the circumstances set forth in the hypothetical set of facts which defendant's counsel posed to him. However, the hypothetical upon which Sheerin based his opinion, like plaintiff's, did not conform to the court's earlier findings of fact and conclusions of law on the issue of liability. It credited Mrs. Gilbert with having rendered the following services only:

> "As packaging, labeling and advertising materials were prepared, they were often shown to Mrs. Gilbert for her comments and reactions. She also attended parties given to introduce the product to the trade and press, and at one party circulated among the guests to stir up enthusiasm for the product. She suggested possible names for the gloves." (Transcript, 182)

The hypothetical thus failed to mention an important aspect of the advice which Mrs. Gilbert was found by the court to have given to Stanton: her suggestions as to the design and fit of the glove. It also omitted the fact that Mrs. Gilbert made herself available to give such advice whenever Stanton requested it.

Moreover compensation on an hourly basis (at any rate) seems inappropriate in the circumstances of the case. Although Sheerin testified that free lance workers usually were paid at an hourly rate, he admitted that project fees (compensation for all work done in connection with a product without regard to the numbers of hours actually spent) was a common arrangement. (Transcript,186) An award of damages on a project basis (i.e., without regard to time spent) seems appropriate for several reasons.

Mrs. Gilbert participated in the development and promotion of the Hands Beautiful glove for a period of over a year. During that time, her services were not rendered on any regular time schedule. She met Stanton at dinner,

after work or on weekends. No evidence was presented which suggested that she kept any record of the amount of time she spent in connection with the project and there is no reason to believe that she would or should have. Stanton continually told her that he would be "fair" to her with regard to compensation and, for this reason as well as the wording of her agreement with Aris, she naturally anticipated that she would receive remuneration based on the successful sale of the gloves. Furthermore, there is no evidence that Stanton requested her to keep time records, that he considered the actual amount of time she spent on the project significant, or that Aris normally paid consultants on the basis of an hourly fee.

In fact, when Aris, by Stanton, did hire outside consultants to work on aspects of the gloves' production, they were not paid on an hourly basis. One such consultant, Harvey Chandler, was hired at a monthly fee of $435. to do marketing and advertising work, including contact with the media and other consultants. (Transcript, 156) Chandler had two or three people working with him on the Hands Beautiful account, but Chandler's fee was unrelated to the time he or any of them spent on the project. (Transcript,157) A second consultant, Warren Verrow, was also paid a monthly fee, in his case $500. per month. (Transcript,159) These arrangements, as well as a third, made with a consultant

in connection with work done on other products and which was not tied to the amount of time spent, (Transcript, 163) demonstrate that Aris was more concerned with the quality of the work produced than the number of hours expended, and constitute a fair and reasonable structure for awarding damages to Mrs. Gilbert.

There remains for determination the precise amount to which Mrs. Gilbert is entitled as a project fee. In this connection a comparison of the work done by Chandler with that done by Mrs. Gilbert is appropriate. The letters and memos which Chandler sent to Stanton establish that Chandler was responsible for conceiving and developing packaging materials and promotional items. Mrs. Gilbert was never placed in charge of conceiving such items, but rather was normally called upon to comment upon ideas which others had presented. However, unlike Chandler or the other outside consultants whom Stanton hired, the advice which Mrs. Gilbert gave to Stanton was not restricted to promotion and advertising matters, but related to every aspect of the glove's development, including some problems with the material used to produce the glove and design of the product. Indeed, Mrs. Gilbert was like a general consultant who gave advice in varied areas including specific areas in which Stanton had hired other outside consultants. Moreover, Stanton relied upon Mrs. Gilbert to be available for comment and advice

whenever he desired. The evidence on the liability at trial established that Stanton relied on Mrs. Gilbert to work until the project was complete. The at hand availability of Mrs. Gilbert's service was clearly a significant part of her value to Aris.

We conclude that, on the basis of the quality of her work, the consistency with which it was rendered, and a comparison of project fees paid by Aris to other outside consultants whose work was similar to, but not as broad in scope as Mrs. Gilbert's, an award of $12,000. would fairly and reasonably compensate her for the services which she rendered, and that the defendant is liable to her in that amount with interest at the legal rate per annum from September 18, 1969, the date on which her services terminated. (Transcript of liability trial, 452) 1/

Submit judgment on notice.

Dated: New York, New York
March 16, 1976.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTE

1. Mrs. Gilbert's testimony was that discussions took place with Stanton "From '68 to about when the glove came out in '69." The first shipment of the gloves was on September 18, 1968. (Memorandum, p. 7)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

ANNICE GILBERT,

Plaintiff,

COMPLAINT

-against-

CONSOLIDATED FOODS CORP.,

Defendant.

----------x

Plaintiff, by her attorney, Philip Handelman, complaining of the defendant, alleges:

AS AND FOR A FIRST CAUSE OF ACTION

1. At all times herein mentioned, the plaintiff was and still is a resident of the City, County and State of New York.

2. Upon information and belief, Aris Gloves Inc. (hereinafter called "Aris") was a corporation organized under the laws of the State of New York, having been engaged in the business of manufacturing and selling ladies' gloves and other products. Subsequent to March 30, 1968, Aris was purchased by and merged into the defendant, Consolidated Foods Corp.

3. Upon information and belief, the defendant was and still is a corporation organized under the laws of the State of Maryland, is engaged in the manufacture and sales of ladies' gloves and other products through its Aris Glove division, and has a place of doing business in the City, County and State of New York.

4. On or about March 30, 1968, Aris entered into an agreement in writing with the plaintiff, wherein it was provided that in consideration for the plaintiff's disclosing to Aris of an idea which the plaintiff

had relating to items and products which Aris could manufacture and sell, Aris agreed

(a) to accept such disclosure in confidence;

(b) not to reveal the matter disclosed for a period of 5 years;

(c) that the idea was the plaintiff's sole property and originated with her, and

(d) that if Aris decided to manufacture a suggested product, it would pay to the plaintiff a reasonable compensation.

5. Pursuant to the aforesaid agreement, plaintiff disclosed to Aris the idea she had which was, in substance, that the defendant should manufacture and sell a hand glove made, at least in part, of Lycra Spandex, a fabric manufactured by E. I. DuPont De Nemours & Company, or other fabric with similar physical qualities, which fabric would benefit the hands of the wearer of the glove cosmetically and therapeutically by creating a massaging action on the hands and thereby depressing and flattening veins, increasing the blood circulation and otherwise have a beneficial effect, keeping the skin on the hands flat and smooth; and that Aris should manufacture and sell facial masks, socks, body suits, bandages and hose made, at least in part, of Lycra Spandex, which fabric would benefit the wearer of the aforesaid products cosmetically and therapeutically in a manner similar to that described above.

6. Thereafter, in violation of aforesaid agreement, and in violation of the confidential relationship between the parties, Aris and/or the defendant has taken steps to manufacture and sell and/or has manufactured and sold gloves, made facial masks, socks, body

suits, bandages and hose made in part of Lycra Spandex Fabric, advertising, publicizing and representing said product to possess cosmetic and therapeutic value as aforesaid, all without paying to the plaintiff any compensation whatsoever, which compensation was duly demanded by the plaintiff.

7. Plaintiff has duly performed all the terms and conditions of the said agreement on her part to be performed.

WHEREFORE, plaintiff demands

(1) a judgment and decree directing the defendant to account to the plaintiff for all profits received by it on the sale of gloves, facial masks, socks, body suits, bandages and hose made in part of Lycra Spandex or fabric having similar physical properties, and judgment in favor of the plaintiff and against the defendant in an amount equal to said profits, with interest from the dates said profits were realized by defendant;

(2) judgment against the defendant in a sum equal to the value of the idea described herein at paragraph 5, with interest thereon from the date when the defendant first commenced the manufacturing of the aforesaid products;

(3) a decree enjoining the defendant from manufacturing gloves, facial masks, socks, body suits, bandages and hose made in part from Lycra Spandex fabric;

(4) punitive damages in the sum of $250,000;

(5) costs and disbursements of this action.

PHILIP HANDELMAN
Attorney for Plaintiff
Office and P. O. Address
360 Lexington Avenue
New York, N. Y. 10017
Tel. No. 682-9180

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ANNICE GILBERT, :

Plaintiff, :

-against- :

CONSOLIDATED FOODS CORP., : ANSWER

Defendant. :

----------X

Defendant, Consolidated Foods Corporation, by its attorneys Rogers Hoge & Hills, answering the Complaint herein:

AS A FIRST DEFENSE

1. Alleges that the Complaint fails to state a claim upon which relief can be granted.

AS A SECOND DEFENSE

2. Denies knowledge or information sufficient to form a belief as to the truth of any of the allegations set forth in Paragraph 1 of the Complaint.

3. Denies that Aris Gloves Inc. was a corporation organized under the laws of the State of New York and that it was engaged in the business of manufacturing and selling products other than ladies' gloves and, except as so denied, admits the allegations set forth in Paragraph 2 of the Complaint.

4. Alleges that defendant does not have in its possession any written agreement between it and plaintiff and, for that reason, denies knowledge or information sufficient to form a belief as to the truth of any of the allegations set forth in Paragraph 4 of the Complaint.

5. Denies all the allegations set forth in Paragraph 5, 6 and 7 of the Complaint.

AS A THIRD DEFENSE

6. Alleges that the alleged agreement between Aris and plaintiff is null and void due to failure of consideration.*

WHEREFORE, defendant demands judgment dismissing the Complaint and awarding defendant its costs and disbursements herein.

ROGERS HOGE & HILLS

By _____
A Member of the Firm
Office and Post Office Address
90 Park Avenue
New York, New York 10016
687-2120

* AS A FOURTH DEFENSE*

7. Alleges that the alleged agreement upon which plaintiff seeks relief herein is void pursuant to §5-701 of the New York General Obligations Law, commonly referred to as the Statute of Frauds.

*As amended pursuant to order dated July 1, 1974.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNICE GILBERT,

Plaintiff,

-against-

CONSOLIDATED FOODS CORP.,

Defendant.

70 Civ. 4536 (MEL)

NOTICE OF CROSS-APPEAL

NOTICE IS HEREBY GIVEN that Consolidated Foods Corporation, the defendant above named, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from those portions of the memorandum decisions herein dated May 21 and October 14, 1975 and March 16, 1976 and from the final judgment entered herein on April 12, 1976, which grant plaintiff relief herein.

Dated: New York, New York
May 21, 1976

Yours, etc.,

ROGERS HOGE & HILLS

By _____
A Member of the Firm
Attorneys for Defendant
Consolidated Foods Corporation
90 Park Avenue
New York, New York 10016
(212) 953-9200

TO:

Philip Handelman, Esq.
360 Lexington Avenue
New York, New York 10017

Attorney for Plaintiff

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANNICE GILBERT,

Plaintiff,

v.

CONSOLIDATED FOODS CORP.,

Defendant.

---

70 Civ. 4536 (MEL)

PRE-TRIAL ORDER

On November , 1974 the attorneys for the parties appeared before this Court at a pre-trial conference, and the following actions were taken:

1. The pleadings consist of the Complaint, the Answer, and an amendment to the defendant's Answer made pursuant to the defendant's motion and subsequent Order . Defendant asserts that there is an issue as to illegality of performance of the alleged agreement, and if necessary, seeks to amend its Answer to allege such a defense. Plaintiff opposes such an amendment.

2. The parties agreed that the trial of this action should be based upon this Order and upon the pleadings.

3. The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues.

a. Plaintiff, Annice Gilbert, (herein Mrs.Gilbert) is a resident of the City, County and State of New York.

b. Defendant, Consolidated Foods Corporation (herein Consolidated) is a corporation organized and existing under the laws of the State of Maryland with its principal place of business in Chicago, Illinois.

c. Plaintiff's claim herein is for breach of contract and breach of trust and confidential relationship, with respect to an idea allegedly disclosed by plaintiff pursuant to a written document dated March 30, 1968. Plaintiff seeks recovery of the value of her alleged idea, an accounting of defendant's profits and punitive damages in the amount of $250,000.

d. Aris Gloves, Inc. was a corporation organized and existing under the laws of the State of California, with its principal place of business in New York, New York. On or about July 1, 1969, it was acquired by Consolidated and since then the business has been conducted as the Aris Gloves Division of Consolidated (said Aris Gloves, Inc. and Aris Gloves Division herein collectively referred to as Aris).

e. The President of Aris now and since 1958 is Lari Stanton (herein Stanton).

f. The husband of the Plaintiff is David Gilbert.

4. Plaintiff's contentions are set forth in plaintiff's proposed findings of fact and conclusions of law and plaintiff's Pre-Trial memorandum submitted herewith.

a. Defendant's contentions are contained in its proposed findings of fact submitted herewith.

5. The exhibits which each party now expects to offer at the trial are those identified in a stipulation to be filed by the parties. Should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to each party and to the Court by serving and filing a supplemental memorandum. The supplemental memorandum may be in a short form statement filed with the Deputy Clerk for calendars unless served at trail, in which event it is to be filed with the trial Judge. It shall set forth the reason why the exhibit was not h eretofore identified. No exhibit may be offered at trial unless identified in the aforesaid stipulation or in a pre-trial memorandum.

a. The parties agree that the documents which are listed in the aforesaid stipulation, are authentic, but each party reserves the right to object to the admissability of such document on the grounds of materiality , relevance, heresay rule, or any other rule.

6. The parties agree that the witnesses whom each party now intends to call are as follows:

For Plaintiff:

LARI STANTON
ANNICE GILBERT
DAVID GILBERT
GELA GAMBLE
EDWARD WHITE
JULIA HECTOR

For Defendant:

LARI STANTON
HENRY COHEN
FRANKLIN TAUB
DIANE LEVINE
LAWRENCE KRAMOS
MARGARET KRAMOS
HARVEY CHANLER
ANDREW J. GRAHAM
MS. ERNESTINE WINKLER

Should any party hereafter decide to call any additional witnesses, prompt notice of their identies shall be given to each of the parties and to the Court by serving and filing a supplemental memorandum. The supplemental memorandum may be in a short form statement filed with the Deputy Clerk for the calendar unless served at trial at which time it is to be filed with the trial Judge, and it shall set forth the reasons why the witness was not theretofore identified. No witness may be called at trial unless identified in the stipulation or a memorandum.

7. The plaintiff at this time expects to require three days of trial. Defendant at this time expects to require three trial days.

8. The Court shall first try the issue of liability, and if the defendant is found liable to the plaintiff, a trial on the issue of damages will then be held.

9. The issues to be tried in the liability stage are formulated by the Court (with the consent and agreement of the parties) as follows:

A. Issues proposed by Plaintiff.

1) Is the document dated March 30, 1968 a valid and binding contract, or, as Defendant contends, invalid for failure of consideration and unenforceable because it allegedly lacks essential elements and is thus indefinite and because it is allegedly barred by the Statute of Frauds?

2) What was the idea revealed by Mrs. Gilbert pursuant to the alleged agreement?

3) Was the idea disclosed by Mrs. Gilbert of value to the Defendant, thereby constituting valid consideration for the agreement?

4) Did Defendant utilize the idea revealed by Mrs. Gilbert pursuant to the alleged agreement without paying her a "reasonable return" for it and thus breach the contract of March 30, 1968?

5) Which, if any, of the promotional ideas given to Defendant by Mr. and Mrs. Gilbert were used by Defendant and were they covered by the alleged agreement?

6) Did a relationship of trust and confidence between the Plaintiff and Defendant arise from the agreement of March 30, 1968, and, if so, did Defendant breach that relationship by utilizing Plaintiff's idea without paying to her the reasonable value of the idea, as agreed?

7) Did the parties agree on March 30, 1968, or thereafter, that a "reasonable return" for Plaintiff's idea was 8% of Defendant's gross sales of the glove, body suit and other products manufactured and advertised in accordance with the idea?

8) Is the Defendant liable for the reasonable value of her idea?

9) Is the Defendant liable for 8% of Defendant's gross sales of the "Hands Beautiful" glove and the body suit?

B. Issues proposed by Defendant.

1) Is the document dated March 30, 1968 a valid, complete and binding agreement or, as contended by Defendant, invalid for failure of consideration and unenforceable:

(a) because it lacks essential elements and is thus indefinite?

(b) because it is barred by the Statute of Frauds?

(c) by reason of illegality of performance?

2) What was the "item of confidence" or "idea" revealed by Mrs. Gilbert pursuant to the alleged agreement?

3) Was the "item of confidence" or "idea" revealed by Mrs. Gilbert pursuant to the alleged agreement:

(a) novel and original?

(b) concrete?

(c) in fact confidential?

(d) of value to Defendant?

4) Did Defendant manufacture the "item of confidence" or "Idea" revealed by Mrs. Gilbert pursuant to the alleged agreement?

5) Which, if any, of the promotional ideas used by Defendant originated with plaintiff?

6) Were said promotional ideas covered by the alleged agreement?

7) Were the promotional ideas which originated with Mrs. Gilbert:

(a) novel and original?

(b) concrete?

(c) of value to defendant?

8) Were said promotional ideas valueless because their utilization by defendant would be in violation of law?

SO ORDERED

(U. S. D. J.)

L A R I S T A N T O N, called as a witness by the plaintiff, being first duly sworn, testified as follows: [2]

DIRECT EXAMINATION

BY MR. HANDELMAN:

Q Mr. Stanton, you are the president of Aris Gloves?

A That is correct.

Q How long have you been president of that company?

A I think approximately since 1960, '61, '62, thereabouts.

Q Before you became president you were connected with a company for a number of years? [3]

A That is correct.

Q As a matter of fact, was it your family's company?

A That is correct.

Q For how many years were you connected with Aris Glove before you became its president?

A I was employed by Aris Gloves starting in 1949.

* * * *

Q After March 30th, did you have any discussions [19]
with Mrs. Gilbert and Mr. Gilbert about the idea which she gave you on March 30th?

A Yes.

Q When was the first time? Well, you had some discussion with her on the 30th, didn't you?

A Correct.

Q And when after March 30th did you next have any discussion with her and Mr. Gilbert about that idea?

THE COURT: Shall we call the idea the night glove?

MR. HANDELMAN: It is not the night glove, your Honor.

THE COURT: All right.

What was the idea that she did give you on March 30th?

THE WITNESS: This is what I say. The idea she gave me on March 30th was the night mitten glove made from power net.

Q That is the idea she gave?

A That is correct.

THE COURT: From power knit?

THE WITNESS: Power net.

Q Did she ever say to you that she had found the

perfect material for you to make a stretch glove that would have therapeutic qualities? [20]

A No.

Q She never said that?

A No.

Q She never discussed anything about therapeutic qualities?

A Can we discuss the March 30th meeting now, Mr. Handelman, is this what you are referring to?

Q Yes, start with the March 30th meeting.

A On the March 30th meeting the only idea that she divulged at that time was a power net material that would flatten the veins in the back of the hand. That was the only idea that she gave me that evening.

* * * *

Q Now, these ideas which were discussed in your advertising or mentioned in the advertising about these qualities, did you discuss those with the Gilberts? [44]

A Could we be more specific, please?

Q Referring to the advertising material, without going into each one separately, but this mass of advertising material which referred to ideas of hand-softening and

helping circulation and the like, were those discussed, [45] were those specific things discussed with the Gilberts?

MR. STOCKELL: Objection.

Your Honor, we won't object to a question as to what was discussed with ~~the~~ Mrs. Gilbert~~s~~ but we do not see what was discussed with Mr. Gilbert is relevant to the case.

There is only one plaintiff.

THE COURT: Sustained.

The fact there is only one plaintiff does not mean discussions with her husband might not be relevant; I don't know.

Did you have any discussions with Mrs.Gilbert with regard to the material or the terms used in the advertising that has been put in evidence here today?

THE WITNESS: The only claim that I discussed--

MR.HANDELMAN: Would you read his Honor's question, please.

(Question read.)

THE COURT: Before the ads were prepared, did you have any discussions with her about either the specific material in them or the terminology used?

THE WITNESS: Very infrequently.

THE COURT: Will you tell us what occurred during

those conversations? [46]

Q How infrequently?

A I would say maybe I discussed the claims or the advertising maybe once or twice with Mrs. Gilbert.

THE COURT: And whenwould those one or two times have been?

THE WITNESS: I would say probably in the end of 1968 or early 1969.

THE COURT: Do you want to pursue the question?

Q Isn't it a fact that these advertising ideas were a matter of frequent discussion between you and Mr. and Mrs. Gilbert?

MR. STOCKELL: Objection.

THE COURT: Sustained.

Let's stick to Mrs. Gilbert for the moment.

Q With Mrs. Gilbert?

A No.

MR. HANDELMAN: Your Honor, may I come to the bench?

THE COURT: I think you can speak openly here. There is no jury or anything.

What is your position?

MR. HANDELMAN: I don't think limiting it, as your Honor stated yourself, they were husband and wife and

they were closely associated in this. He was the one who introduced her originally to Mr. Stanton. [47]

THE COURT: Why isn't he a plaintiff?

MR. HANDELMAN: The fact that he does not contribute maybe to an idea but her idea is no reason why he should be a plaintiff necessarily.

THE COURT: Let Mr. Gilbert come and testify that what Mrs. Gilbert said was her idea then.

MR. HANDELMAN: Can we say subject to connection?

THE COURT: I would rather not have it subject to connection, no.

Q As a matter of fact,before you got this advertising out, you had various samples made of the gloves, did you not?

A Yes, I did. We did.

Q That came first, didn't it?

A That is correct.

Q And did you send samples of the gloves as they progressed to Mrs. Gilbert?

A I think there was one sample or maybe two samples that we had given to Mrs. Gilbert.

Q And did you--

THE COURT: That was before they were actually

merchandised, I take it?

[48]

THE WITNESS: That is correct.

THE COURT: What was your purpose in doing that? Was that on your instructions?

THE WITNESS: I think we were friends and I sent them to her because she was a friend and she knew about the glove.

THE COURT: Did you ask her to respond in any way to them or react to them or perform any service for you in connection with them when you sent them to her?

THE WITNESS: I probably said,"What do you think of them, what is your opinion of them?"

THE COURT: Do you recall receiving any response to that question?

THE WITNESS: Yes.

THE COURT: What was it?

THE WITNESS: She didn't like them actually. She did not like them because they made ridges on her hand. She said the fingers were too short. She criticized the thumb. She wanted us to make what is called in the trade a circular net seamless glove which would not leave any ridges on the hands,and a glove we had given to her and the glove that we always manufactured and still do today is what is called a cut-and-seam glove. It has seams throughout.

She was not really impressed at all about the [49]
glove.

Q Did she criticize the length of the fingers?

A I believe at one time she did, yes.

Q And did she criticize the way the thumb was set into the glove?

A She might have but I don't recollect.

Q As a matter of fact, when she made those criticisms, didn't you go back to the maker of the samples and have new samples made?

A For a long period of time there was a lot of development work in the developing of the proper sizes for that glove and I can't say specifically that any suggestions she made were incorporated.

Q Can you say that they were not?

A I can't say if they were or they were not. Basically her criticism of the glove was that they made ridges on the fingers and she wanted to see if we could not make what we call a seamless glove, which is impossible for us to make.

* * * *

THE COURT: Can you tell me in just a few [69] words the extent to which you submitted proposed promotional material to Mrs. Gilbert for her reaction before it was actually used?

There is no reason why we s-hould have to spend six days on this case, gentlemen, and I want to cut it down, get to the heart of it.

THE WITNESS: I never submitted directly to Mrs. Gilbert any proposed advertising.

THE COURT: What did you submit to her?

THE WITNESS: David Gilbert was a personal friend of mine and I was interested to get his suggestions that he might have and, frankly, I asked many other people their suggestions as to are we going in the right direction in our advertising.

So he was just one of the many people that [70] gave us his idea as to what they thought about our advertising thrust.

THE COURT: Thank you. Do you want to ask further questions?

BY MR. HANDELMAN:

Q Isn't it a fact, Mr. Stanton, that you sent not only the advertising materials but the samples so that you could discuss this matter that you stated was

of great interest to all three of you?

A Samples of what?

Q Samples of the gloves about to be promoted.

A I sent at one time through David Gilbert to Mrs. Gilbert several pairs of samples to try, yes.

* * * *

[78]

Q When you went to that meeting at the Right Bank on March 30, 1968, you knew that you were not going to get the idea unless you agreed to pay something? You knew that in advance, didn't you?

A That is correct.

Q And you knew that how?

A Because either Mr. Gilbert or Mrs. Gilbert told me.

Q And did you know that it was Mrs. Gilbert that was going to give you the idea?

A Yes.

Q What did you consider was the function of Mr. Gilbert in any of those meetings?

A He was a friend and an impartial observer.

Q Impartial observer. But you didn't consider

that he was the one that was going to give you any ideas, did you? [79]

A No.

Q And when you signed that agreement and when you said, "I will pay you" -- you said that verbally too, didn't you?

A I said that, correct, "I will pay you a reasonable amount for an idea you are about to give me."

Q That was even before you signed the agreement, is that right?

A That's correct.

Q And you repeated that frequently in the course of your relationship with Mrs. Gilbert and Mr. Gilbert?

A I said, "Anice, I will always be fair with you. Don't worry."

Q Did you say that after she gave you the idea?

A That's correct.

Q And then you said that after you started making samples, didn't you?

A That's correct.

Q And you said that after you started getting the advertising out, didn't you?

A That's correct.

* * * *

Q I show you 37 for identification and ask you what that is? [95]

A This is a Lycra Spandex glove.

Q It's a sample glove?

A Yes.

Q About when was that made? That is, if you know.

A I would say maybe towards -- I would say it was somewhere early in the trials, perhaps May 1968.

Q And did you discuss that sample with Mrs. Gilbert?

A I think I did, yes. [96]

Q I show you 38 for identification and ask you what that is.

A This is a Lycra Spandex glove or a Spandex glove.

Q Another sample?

A This sample, Mr. Handelman, seems to be much looser --

THE COURT: The question is whether it is a sample.

THE WITNESS: It is another sample.

Q Would that be an earlier or a later sample?

A I don't really know, Mr. Handelman.

Q Did you discuss that one with Mrs. Gilbert?

A I don't recollect actually.

Q Now, on this one that you do recollect, 37 for identification, can you tell us what the discussion was?

A Well, it was rather obvious that I didn't need too much discussion, that the glove was too short. It was a children's glove and the fingers were too short. It was rather obvious. [96]

THE COURT: That is not the question. The question is what did you talk to Mrs. Gilbert about with respect to that glove?

THE WITNESS: I don't recollect the specific conversation but I assume she made some comment on it but I don't recall specifically what. [97]

THE COURT: Apparently you do recall that you talked to her about that glove, is that right?

THE WITNESS: Yes.

THE COURT: But you don't remember what the discussion was?

THE WITNESS: No.

Q By the way, this discussion that you had with Mrs. Gilbert about 37 for identification, this sample glove, was that after March 30, 1968?

A I would say so, yes.

Q I show you 39 for identification and ask you, sir, what is that?

A This is a Lycra Spandex glove.

THE COURT: Are we going to have any more of these?

MR. HANDELMAN: Just a few more, your Honor.

THE COURT: Let's move along. It takes a lot of time for this routine stuff.

I assume the question is did you discuss that with Mrs. Gilbert? It's a Lycra Spandex glove.

THE WITNESS: Maybe I can clarify something. There were one or two conversations, several conversations with Mrs. Gilbert as far as the samples I sent to her. [98] I don't at this time recollect her conversations each time for each sample.

THE COURT: I can understand that. I can understand in the sense that it's a human characteristic not to remember everything in detail but Mr. Handelman is entitled to ask you the questions he asks.

You did seem to remember that you did discuss Exhibit 37 with Mrs. Gilbert and I would like to ask you, first of all, whether I am correct in understanding that you do recall discussing that one, because you did say so?

THE WITNESS: Yes, I do recollect, your Honor.

THE COURT: What is there about that which makes you fairly clear that you discussed that item with Mrs. Gilbert but you can't be sure about the others?

THE WITNESS: Well, I think one of her comments was that the fingers were too short and I recall her saying that. That is, that the fingers were too short, your Honor.

THE COURT: Okay.

[98]

Q Didn't you also tell us that the fingers on 38 were too short?

A This glove has been washed an awful lot and I really can't tell from this glove.

Q It's been washed?

[99]

A It looks like it's been washed.

THE COURT: Can we sum it up? It's perfectly satisfactory to both sides if we do sum it up and Mr. Handelman can tell me if he wants to go farther.

As far as the sample of the gloves is concerned you did discuss some of them with Mrs. Gilbert and you can't remember which ones?

THE WITNESS: That is correct.

THE COURT: Except that you seemed to remember 37?

THE WITNESS: Correct.

THE COURT: And you did, did you -- and correct me if I am wrong -- also furnish her with samples?

THE WITNESS: That is correct, your Honor.

* * * *

Q Do you remember with respect to this exhibit, which is 40 for identification, that you sent it to Mr. Gilbert rather than Mrs. Gilbert, is that what you are saying?

THE COURT: He said he might have given it to Mr. Gilbert but he doesn't recollect giving it to Mrs. Gilbert; is that correct?

THE WITNESS: That is correct.

Q What is there about that particular exhibit that makes you say that you didn't give it to Mrs. Gilbert but you gave it to Mr. Gilbert or might have given it to Mr. Gilbert?

A It was basically that my contact was with Mr. Gilbert.

Q When you gave samples to Mr. Gilbert --

THE COURT: Let's have one lawyer do the questioning. If you want to write a list of questions that you want Mr. Handelman to ask, all right.

Go ahead, Mr. Handelman.

Q When you gave the samples to Mr. Gilbert did you give them to him with the idea that Mrs. Gilbert would have an opportunity to examine them and discuss it with you?

A In this particular instance I don't recollect why the sample was made up. I assume it was made up

because we were trying to emulate a Supphose panty hose or panty hose -- or Supphose hosiery which was the big rage at that time and still is.

Q I understand that, but what I asked you is when you gave these various samples in some cases to Mr. Gilbert, wasn't it for the purpose so that the three of you could discuss the merits or failings of any of these objects?

A I think we should go over Exhibit by Exhibit because it's a broad question. [102]

THE COURT: I really would like to get to the heart of this matter, if I can. If there are qualifications you want to give in the answer to the question, then qualify it.

Mr. Stanton, would it be a fair statement to say this: Your contact was basically with Mr. Gilbert?

THE WITNESS: Yes .

THE COURT: As far as the gloves were concerned, those you did submit samples of to Mrs. Gilbert?

THE WITNESS: Correct.

THE COURT: As far as the other items, particularly items relating to men-like socks and jockey shorts and especially, of course, the items you say Mr. Gilbert's friends were interested in, you submitted to Mr. Gilbert. But I assume that you didn't tell him, "I don't want you to show this to your wife", or "I don't want to hear what your wife has to say."

I assume your normal expectation might have been that he might have spoken to his wife and reflected her views?

THE WITNESS: Yes.

THE COURT: But, on the other hand, you didn't say, "Please be sure to talk to your wife and let me know what she has to say"? [103]

THE WITNESS: That is correct.

Q When you tell his Honor that your contact was basically with Mr. Gilbert, isn't it a fact that you met with Mrs. Gilbert frequently each week during that period?

THE COURT: During what period?

Q During the period of March 1968 through 1969?

A No.

Q Didn't you have dinner with the Gilberts?

THE COURT: I would like to distinguish this. First of all, did you ever have any meetings with Mrs. Gilbert alone about these items?

THE WITNESS: I only met with Mrs. Gilbert once.

THE COURT: Alone once?

THE WITNESS: Yes. It was at a restaurant we bumped into each other by coincidence.

THE COURT: Did you ever have an arranged meeting with regard to business, of course, with Mrs. Gilbert alone?

[103]

THE WITNESS: The only one was in April 1970, and I don't recall the specific date. But there was a meeting at that time in April 1970.

THE COURT: And what was the subject of that?

[104]

THE WITNESS: The subject of that was to consummate the amount that we were going to pay Mrs. Gilbert for the idea she was going to have given us, which was for the flattening of the veins in the back of the hand.

THE COURT: Are you saying except for that meeting you have never met with Mrs. Gilbert on business matters alone?

THE WITNESS: That is correct.

Q Did you have dinner with Mrs. Gilbert and Mr. Gilbert?

A Yes, I did.

Q Did you go on vacations with them?

A I think we went on a vacation once or perhaps -- it could conceivably be twice.

THE COURT: I am perfectly aware that there was a fair amount of intercourse between Mr. Stanton and Mr. and Mrs. Gilbert socially and otherwise.

Q And when you had dinner with Mr. and Mrs. Gilbert did you discuss this glove?

A Yes, we did.

Q As a matter of fact at that time between March 1968 and the end of 1969 the Hands Beautiful glove was the most important thing in your life, wasn't it?

A I would say no.

* * * *

Q Coming back to your meetings with Mr. and Mrs. Gilbert, do you remember making the following answers to the following questions, Page 194: 109

"Q Well, by that I mean are these samples that you had made up?

"A Correct.

"Q Would you say that you turned these over to Mr. or Mrs. Gilbert?

"A I turned it over to Mr. Gilbert, yes.

"Q Well, by that I mean are these samples that you had made up? 110

"A Correct.

"Q Would you say that you turned these over to Mr. or Mrs. Gilbert?

"A I turned it over to Mr. Gilbert, yes.

"Q On one occasion or more than one occasion?

"A From time to time.

"Q When you turned each one over to Mr. Gilbert, did you elicit his comments about them?

"A Yes."

Going to Page 200:

"Q Is it also true that you may have told Mr. Gilbert to show these samples to Mrs. Gilbert?

"A Yes."

Do you remember making those answers to those questions?

A Yes.

Q Let me show you Exhibits 41 and 42 --

MR. SWIRE: Would you read the next question and answer as well?

THE COURT: You can read it, if you want.

MR. SWIRE: "Q Did you ever have any conversations with Mrs. Gilbert in which she told you of her reaction to these samples?

"A Not that I can recollect." [111]

Q I show you Exhibit 41 for identification and ask you what that is.

A Looks like part of a glove.

Q Is that the same as this Exhibit 51 for identification?

THE COURT: It is not in the same condition, obviously. What do you mean by, is it the same?

MR. HANDELMAN: Same material.

THE COURT: Is it the same material?

THE WITNESS: Yes, it is, your Honor.

Q I show you Exhibit 42. Is that also the same material?

A Yes, it is.

Q On this Exhibit 42, do you notice a curling here?

A Yes, I do.

Q Did you ever have any discussions about that curling with anyone?

A Yes, we did.

Q What was the discussion on that?

A Well, I think we discussed the curling with - -

THE COURT: Who is "we"?

THE WITNESS: I discussed the curling with David Gilbert. There could have been -- there probably were discussions with Mrs. Gilbert on the curling. I discussed it with Somark Gloves, the manufacturer of the glove. I also discussed it with Webco, the manufacturer of the material. 112

Q What was the discussion?

THE COURT: He has talked about five different discussions.

MR. HANDELMAN: No,it is limited to curling.

THE COURT: But he has talked about five different people he talked to.

Q Were any of these people --

THE COURT: I think that we should specify.

Q What was the discussion with Mrs. Gilbert about the curling?

A At the beginning we wanted to eliminate the curling because it was most difficult to manufacture gloves from this curling material.

THE COURT: That doesn't tell us what you talked to Mrs. Gilbert about.

Q What did you say?

A I might have asked her how to eliminate the curling.

THE COURT: Would she know?

THE WITNESS: I probably asked a lot of people, and she was one of them. [113]

THE COURT: Do you remember anything else you talked to her about as to the curling, as to the material?

THE WITNESS: No, I don't your Honor.

Q When you discussed with Mrs. Gilbert about this curling, where was that discussion?

A I can't tell you specifically. I would imagine it was at one of our dinner meetings.

THE COURT: I am not interested in what you imagine. Do you mean, when you use that word, there was a good likelihood --

THE WITNESS: That it was at a dinner we had together, your Honor.

Q Can you fix the time?

A No, I can't, except I would say it probably would be maybe June, July 1968.

Q When you spoke to Mrs. Gilbert at dinner in June or July 1968 about the curling, was that before you had had discussions about the curling with other people after?

THE COURT: What difference does it make?

MR. HANDELMAN: If your Honor will bear with me, it makes a great difference.

A I would assume the first discussion I had with the curling was with Somark Gloves, the manufacturer --

THE COURT: I hate to be fussy as a lawyer, but is that a pure assumption and, if so, explain why you assume that, or is that a way of saying you believe you did speak to them first.

MR. STANTON: THE COURT: I can't tell you, your Honor, if Somark was the first person I spoke to or not, no.

Q When was your discussion with Somark Gloves with respect to that?

A Generally speaking, any business was conducted over the phone.

Q But it was around the same period of June or July, 1968?

A I would say probably starting January, February of 1968, when we received the first cutting. 115

THE COURT: It was still bothering you in June?

THE WITNESS: That is correct, your Honor.

THE COURT: I am a little confused, Mr. Stanton. You said that you couldn't remember whether you spoke to Somark before you spoke to others about the curling, but you didn't speak to Mrs. Gilbert about this material at all, obviously, until March of '68.

THE WITNESS: That is correct.

THE COURT: Therefore, if you spoke to Somark about it in January of 1968, you must have spoken to them about it first.

THE WITNESS: That is correct. That was my answer but he wanted me to be extremely precise --

THE COURT: I wanted you to tell me whether you spoke to Somark before speaking to Mrs. Gilbert or not.

THE WITNESS: Yes, I did.

Q Who were the other people besides Somark and Mrs. Gilbert that you spoke to about the curling?

A As I recollect, it could have been --

Q Not what it could have bee-. You said there were four or five people --

THE COURT: He said Webco, Somark, Mrs. Gilbert --

THE WITNESS: And maybe Mr. Gilbert. 116

Q Did you talk to Mr. Gilbert before or after you talked to Mrs. Gilbert?

THE COURT: Oh, really, this is silly.

A I don't have the faintest idea.

THE COURT: The important thing is to show, as you have shown, he discussed the curling of this material with Mrs. Gilbert. I consider that a significant element, but I don't have to have the whole history of his discussions with everybody about it.

Q I call your attention to this paper contained in Exhibit 22 in evidence, which says "Re: Webco Fabric Test No. 1, No. 2, No. 3, these still curl but with not so much spring as before, meaning the control is" --

THE COURT: Mr. Trien, would you please sit down. Mr. Handelman is a very experienced lawyer and if he doesn't know how to question a witness, you question him, but not both of you at once.

Q "Meaning the curl is controlable."

Do you remember that paper?

A This paper dated January 22, 1969?

Q '69.

A Yes, I do.

Q So you were still having curling problems in '69?

A That is correct, Mr. Handelman.

Q When did you first experience this curling problem?

A I assume -- excuse me --

Q Does this refresh your recollection?

A No, not at all.

Q Not at all? You don't know when you had your first curling?

THE COURT: He said that doesn't refresh his recollection, but do you remember about when the curling problem firs t--

THE WITNESS: The curling problem occurred actually the first time Henry Cohen brought the material into us in December 1967, and one of the first obvious things I picked up was that the cloth curled too much. This was my first remark to Henry Cohen.

Q You mean the piece of cloth curled?

A Correct.

Q You know that we are talking about a curling problem in the sewing of the glove, don't you? Isn't that what you were pointing out here?

A I think we are talking about the same thing but you are saying it in a different way. We are talking about the inherent curling properties of the material.

THE COURT: Which makes it more difficult to sew?

THE WITNESS: Yes, your Honor.

THE COURT: Gentlemen, we will take a morning recess at this time for ten minutes.

(Recess)

BY MR. HENDELMAN:

Q I show you Exhibits 43, 44, 45, 46, 47 and ask you to tell us what they are.

A 43 looks like a man's Supphose, Mr. Handelman.

THE COURT: I assume on all these you want to know whether they have ever been shown to Mr. or Mrs. Gilbert?

MR. HANDELMAN: Yes, sir.

THE COURT: Are they your products and what are they and after you have told us whether they are your products and what they are, will you tell us as to each what you recall about having shown them to either of the Gilberts, and when.

THE WITNESS: These all are our products. They were given to either David or Mrs. Gilbert either the latter part of 1968 or 1969.

THE COURT: By '69 I take it you mean probably early '69?

* * * *

136

Q Do you know a man named Harvey Chanler, C-h-a-n-l-e-r?

A Yes, I do.

Q Who is Mr. Chanler?

A Mr. Chanler is a professional advertising man and we had him on a retainer basis to do the advertising and copy and promotion of Hands Beautiful when we originally began launching Hands Beautiful.

Q When did you first enter into negotiations with Mr. Chanler for the promotion of the Hands Beautiful gloves?

A I recall it was around August, September, October, 1968. I think, though, we do have a letter which will be submitted - -

THE COURT: Summer or Fall of 1968?

137

THE WITNESS: Yes.

Q This Exhibit 26 for identification, are those from your records of your communications with Mr. Chanler?

THE COURT: Indicate for the record that there is a group of correspondence that makes up that exhibit.

MR. HANDELMAN: Yes, sir.

A Yes, this represents a great deal of correspondence--

THE COURT: Between Aris --

THE WITNESS. And Harvey Chanler, in connection with the advertisement and promotion to develop Hands Beautiful.

Q Does it confirm your recollection that it was August 16 that you started that?

A Yes. As I said, it was in August, September, October, but this indicates that it was August 16, actually.

Q 1968?

A That's correct.

* * * *

Q I show you these exhibits marked 52 through 76 [138] for identification, inclusive, and ask you, sir, do those come from your files?

MR. SWIRE: We have already stipulated that.

THE COURT: All right, it is stipulated they come from the files.

Q What are they?

THE COURT: Can't you suggest what it is you want him to say? Are they what?

Q Are these advertising ideas that you received form the Gilberts?

MR. SWIRE: Objection.

THE COURT: Are they documents you received from the Gilberts?

THE WITNESS: I received them from David Gilbert, your Honor.

THE COURT: You did?

THE WITNESS: Yes.

Q Did you discuss them with David Gilbert?

A Yes, I did.

Q Did you discuss them with David Gilbert in the presence of Mrs. Gilbert?

A I might have, but I don't recollect specifically, your Honor, but I certainly might have.

139

THE COURT: You mean you might have discussed them all in her presence --

THE WITNESS: Some of them, but not all of them, your Honor.

Q Did you discuss them with Mrs. Gilbert?

A It would only be at exceptional times would I discuss them with Mrs. Gilbert.

Q Tell me what were the exceptional times when you discussed them with Mrs. Gilbert?

A Well, frankly, some of these ideas were so completely unmerchandisable and unsound that I didn't want to even -- they were ludicrous and there was no reason --

THE COURT: We are not talking about the times you didn't discuss them. We are asking you to tell us about the times you did discuss them with Mrs. Gilbert. Your answer is confusing to me. You say it would have been only the exceptional times that you discussed them with Mrs. Gilbert; does that mean you remember there were some exceptional times when you did discuss them with her?

THE WITNESS: Yes, there were incidents that I did discuss some of these documents with her, your Honor.

Q Can you tell us which of those you discussed with

Mrs. Gilbert?

A I would have to go over them one by one.

THE COURT: Let me make this suggestion: We are getting close to the lunch hour and why don't you go over those during the lunch hour and figure out which ones you discussed with Mrs. Gilbert and let's go on to something else for the moment.

THE WITNESS: May I have these over lunch?

THE COURT: Yes, you may. They are your property anyway.

Q I show you this group of papers marked 77 for identification --

THE COURT: The whole group is marked 77?

MR. HANDELMAN: That's right, sir.

Q Do you remember that those were identified by Mr. Gilbert on his deposition?

MR. SWIRE: Objection.

THE COURT: Sustained. Do you want this witness to identify them or is there a stipulation --

MR. SWIRE: We stipulated that a number of documents were produced by Mr. Gilbert at his examination.

Q You know that these are the documents produced by Mr. Gilbert --

THE COURT: How does he know they are the

document produced by Mr. Gilbert? If you want Mr. Gilbert to testify -- is he alive? 141

MR. HANDELMAN: I want to question him about these documents.

THE COURT: You can ask him if he knows what they are.

Q Are you familiar with these documents?

A Yes, I am.

THE COURT: How would you characterize them?

THE WITNESS: Well, it is such an assorted -- various material -- that it is difficult to --

THE COURT: What gives them a characteristic, Mr. Handelman?

MR. HANDELMAN: I would prefer to have his characterization, your Honor, if I may.

THE COURT: You are the one who put the group together.

THE WITNESS: There is no common denominator, actually, Judge, there, so it is a little difficult.

Q Are these papers that cover the subject of promotion for the isometric glove?

A It covers the body suits, I think it covers the chin strap, goes into all sorts of areas.

Q They all pertain to the subject matter that you

frequently discussed with Mr. Gilbert, right? [142]

MR. STOCKELL: Your Honor, he can't do that without going through them.

THE COURT: Of course not.

Q I show you this paper from that file and ask you --

THE COURT: Are you going to ask him whether he discussed each one of these --

MR. HANDELMAN: Yes.

THE COURT: We will quit and resume at two o'clock and Mr. Stanton can be given the time to look over those papers.

MR. SWIRE: If they are going to be questioned about separately, your Honor, I think they should be marked separately.

THE COURT: So do I. Mark them A, B and so forth, and will you please look at those papers between now and two o'clock, Mr. Stanton, and be prepared to answer as to the extent to which you recall having discussed those papers with Mr. or Mrs. Gilbert. If there is any in particular you remember discussing with them, put it aside, and if it is a general situation, give me a general answer.

Do you understand?

THE WITNESS: Yes, I do.

[Luncheon recess.]

[143]

AFTERNOON SESSION

[2:00 p.m.]

LARI STANTON, resumed.

THE COURT: I believe we left off at the point where Mr. Stanton had been asked to review two sets of papers. The last one was Exhibit 77 and the other consisted of a group, Exhibits 52 through 76.

MR. HANDELMAN: Yes, sir.

THE COURT: Let's do the 52 to 76 group first and then do the 77 group. Are they both together there?

MR. SWIRE: Mr. Stanton grouped them, yes. He may have intermixed the two exhibits.

MR. HANDELMAN: It will just take me a moment to fix them.

THE COURT: That is going to make life easy.

DIRECT EXAMINATION [continued]

BY MR. HANDELMAN:

Q The first one was 55 for identification. You have had an opportunity to look at those?

A Yes, I have.

Q Can you tell his Honor what they are?

A These are advertising suggestions and the slogans that Mr. David Gilbert submitted to me. There is also here a chart of exercise for the hand that he had

[144]

submitted to me. There is also some suggested TV scripts that he had submitted to me. There is also an extract of an ad from Bergdorf Goodman on Hands Beautiful.

THE COURT: One that advertised your Product?

THE WITNESS: Yes.

THE COURT: I assume that you knew of that ad on your own?

THE WITNESS: Correct.

Q Can you tell us over what period this group of papers were given to you?

THE COURT: I realize it has to be an estimate but give me your best estimate.

THE WITNESS: Yes. I would say the last half of 1968, through 1969.

Q Did you utilize any of the suggestions contained here and are there suggestions in here?

A May I take a look at them, please?

THE COURT: I think he has indicated that there are suggestions.

Q Did you use some of those suggestions?

A Actually I would have to go over each single item here before answering this question.

THE COURT: I guess we will have to do it then.

MR. SWIRE: Your Honor, if they came from David

Gilbert --

[145]

THE COURT: I don't think it's that clear cut. You are perfectly free to put on whatever information you think is relevant with regard to the relationship between Mr. Gilbert and Mrs. Gilbert but there is, as the record stands, a kind of unity which may or may not prove to be significant thereafter.

Let me ask you this: Let's take a look at the whole batch of papers Do you know Mr. Gilbert's handwriting?

THE WITNESS: Yes, I do.

THE COURT: Will you look through here and tell me how many of the papers are in his handwriting, if any of them are?

THE WITNESS: Actually, I believe all of these are in his handwriting or he has made -- all these are in his handwriting except for the Bergdorf Goodman ad and he has made some comments on that one.

THE COURT: Do you know Mrs. Gilbert's handwriting?

THE WITNESS: Yes.

THE COURT: Are any of them in her handwriting ?

THE WITNESS: No.

Q Did you discuss the comments or suggestions

[146]

contained in these papers with Mr. Gilbert?

THE COURT: To clear the air, Mr. Handelman, I would like to know what your theory is as to the relevance of Mr. Gilbert's actions in a situation in which he could have been, but clearly is not, a plaintiff. On what grounds do you believe Mrs. Gilbert is entitled to credit for whatever Mr. Gilbert did?

MR. HANDELMAN: Because Mrs. Gilbert is the only one in the family who had any concept about gloves or isometric body garments.

THE COURT: That isn't a matter of record.

MR. HANDELMAN: No. I can't give you the wagon before the horse, your Honor.

THE COURT: Do you intend to establish that?

MR. HANDELMAN: Yes.

THE COURT: Do you intend to connect Mrs. Gilbert with these documents?

MR. HANDELMAN: That is right, sir.

THE COURT: Subject to connection I will permit testimony about them.

MR. HANDELMAN: Will you read the last question, please.

[Question read.]

MR. HANDELMAN: May I do it one by one, your

Honor? [147]

THE COURT: First let's find out the answer.

A In some instances I discussed them with him.

THE COURT: Will you pick out the ones then which you discussed them with him.

A May I ask you, Mr. Handelman, when you say discussed -- would I acknowledge them or go into detail about them?

Q Mr. Stanton, all I want to know is did you have any conversations about any of these papers that compromise the portion of the exhibit which I have handed you?

THE COURT: Beyond the mere assertion, "I got what you sent me today." Did you discuss the substance with Mr. Gilbert?

THE WITNESS: Can I answer this way: For example, I did discuss these two with him in the context telling him I thought they were terrible and it's a ridiculous idea.

THE COURT: That is discussion. You handed Mr. Handelman some other papers. Will you tell us what the substance of the discussions as to those was?

Q I show you 56 for identification.

THE COURT: Did you discuss the substance of that?

Q Do you remember that paper? Have you ever seen that before? [147a]

A Yes, I have seen it.

Q Did you discuss that with Mr. Gilbert? [148]

A I think I did discuss this with him, yes.

THE COURT: Can you tell us what the substance of the discussion was?

THE WITNESS: I think the idea was that he wrote an ad here, a copy of an ad that was to go into a mail order house or something with a 30 day guarantee or something like that.

THE COURT: I am not asking you what the paper is. I am asking what your discussion with him was.

THE WITNESS: I think the discussion was we had a money-back guarantee of some type and the question was should we run a mail order ad with a money-back guarantee or not.

THE COURT: All right.

Q And did you discuss that with anyone other than Mr. Gilbert?

A I think we had discussed with our advertising people when we originally brought out Hands Beautiful whether or not we should give out any guarantee or not.

Q And did you discuss that subject with Mrs. Gilbert?

A I don't recollect that I did.

Q Do you recollect whether or not

[149]

in your discussions with Mr. Gilbert about this 56 for identification Mrs. Gilbert was present?

A Whenever Mrs. Gilbert was present --

Q I didn't ask you that.

A I am sorry.

(Question read)

A I don't recollect that she was present.

THE COURT: What were you going to say whenever she was present --

THE WITNESS: That was primarily at evening --

THE COURT: That doesn't exclude the possibility.

THE WITNESS: Very rarely did we bring written materials to dinner.

Q Did you ever have any discussions with Mr. Gilbert in your place of business?

A Occasionally, yes.

Q Did you ever have any discussions with Mrs. Gilbert in your place of business?

THE COURT: Mrs. Gilbert alone or Mrs. Gilbert in the presence of Mr. Gilbert also?

MR. HANDELMAN: Either alone or in Mr. Gilbert's presence.

THE WITNESS: I think on one or two, maybe the most three instances, there was a discussion in our place

when Mrs. Gilbert -- in our office -- when Mrs. Gilbert was present. [150]

Q Discussion with who?

A Discussion with Mr. Gilbert and Mrs. Gilbert on Hands Beautiful.

Q Do you mean to tell his Honor that you never discussed the subject of Hands Beautiful with Mrs. Gilbert in your office without the presence of Mr. Gilbert?

A In April 1[illegible], 1970 there was a meeting at our office with Mrs. Gilbert and Mr. Gilbert was not present. The only other time -- I do not recollect any other time that I discussed it with Mrs. Gilbert in my office unless by chance she might have come into our office prior to Mr. Gilbert arriving at our office for a dinner appointment and in case she did I might have discussed it with her.

But I don't really recollect. Conceivably it could have been she arrived for Mr. Gilbert in case Mr. Gilbert was delayed.

Q And you would say she never came alone to discuss anything with you in your office?

A To my recollection, no.

Q Did she have any discussions in your office with employees of yours?

THE COURT: If they weren't in his presence how would he know? You can ask if any of his employees ever reported that she did. [151]

Q Did you ever see her having discussions with any of your employees with respect to this subject of the gloves?

A Did I physically --

MR. SWIRE: Objection, how can he see what the conversation was?

MR. HANDELMAN: He has eyes.

THE COURT: You can't see the conversation.

Q Did you ever overhear any conversation between Mrs. Gilbert and any of your employees?

A I did not overhear any conversation.

* * * *

THE COURT: Putting aside other women, approximately how many times do you believe you discussed the Hands Beautiful project with Mrs. Gilbert with someone else present or without someone else present? In other words, did she engage in a discussion on this subject with you? [168]

THE WITNESS: I need a moment to think about that, your Honor.

THE COURT: Surely.

[Pause.]

[168]

THE WITNESS: Firstly, as I recall, I was only with Mrs. Gilbert once alone --

THE COURT: You have said that several times and I understand that, but I also understand you were with her on a number of occasions when she was with her husband.

THE WITNESS: That is correct.

THE COURT: Whether she was alone or not, that's one time plus any other time -- was it one, a hundred, ten, three, eight? How many would you estimate it was before you got into, let's say, the actual merchandising of the product?

THE WITNESS: If I could put it this way, your

[169]

Honor, answering your question: I saw the Gilberts for dinner sometimes once a week, sometimes twice a month, and sometimes once every two months, so that these would be the times that I --

THE COURT: Let's take an average of once every two weeks.

THE WITNESS: I would say it would be more towards once every three weeks or once every four weeks.

THE COURT: Let's take once every three weeks, then. That would be something like 15 times a year that you might have had dinner with them?

[169]

THE WITNESS: With Mrs. Gilbert and Mr. Gilbert. Occasionally I would have dinner with Mr. Gilbert alone.

THE COURT: Twelve times that you had dinner with Mr. and Mrs. Gilbert?

THE WITNESS: Yes.

THE COURT: Would you say on those twelve occasions, talking about the year commencing March 30, 1968 -- for the remainder of 1968 and 1969 until you actually put this item on the market -- would you say you generally discussed the Hands Beautiful project?

THE WITNESS: Yes.

THE COURT: About a dozen times that way?

THE WITNESS: Yes.

[170]

THE COURT: Were there any other occasions that you are at any other place where her husband is present or with anyone else present you discussed the Hands Beautiful project?

THE WITNESS: There was one time during that period between, I think it was either the latter part of 1968 or 1969, that there was a meeting in our office where Mrs. Gilbert and Mr. Gilbert attended where Hands Beautiful was specifically discussed.

THE COURT: Once?

THE WITNESS: That I recall specifically.

THE COURT: Do you remember any discussions anywhere else, at their office, at your home, at their home?

[170]

THE WITNESS: They never were -- I never was in their home, actually. I can't recollect just at this moment, your Honor.

BY MR. HANDELMAN:

Q How about at your home, any meetings at your home?

A Well, I had cocktail parties at my home where Mr. Gilbert attended, but Mrs. Gilbert did not attend.

THE COURT: So the answer would be no to that?

THE WITNESS: That's right.

[171]

Q During the period his HOnor asked you about, the remainder of 1968, after March 30, and the period in 1969 prior to your first shipment of gloves to that department store, how often did you see Mr. Gilbert?

THE WITNESS: I just was thinking about the last question, your Honor, that was posed and I did have an apartment out in Long Beach, a summer apartment, and there were several times that Mr. and Mrs. Gilbert were there with me and it could very well have been that Hands Beautiful was discussed.

THE COURT: Maybe two or three more discussions?

THE WITNESS: Yes. At one time we went, I think it was out in Montauk together, and I don't know what that particular date was, but we might have discussed it at that time.

* * * *

Q When you got the manufacture of this [213]
glove worked out and ready for marketing, did you have some public presentations?

A Yes, we did.

Q Where was the first one?

A There was a --

THE COURT: On liability, what difference does that make?

MR. HANDELMAN: This is not on liability, your Honor.

THE COURT: Well, this trial is on liability.

MR. HANDELMAN: The participation of the parties, I think, your Honor, is indicative of whether she was a participant or not.

THE COURT: All right, if that is what you are going to ask about. Does Mrs. Gilbert participate?

THE WITNESS: We had a press party at I [214]
think the Rainbow Room at Rockefeller Center, or thereabouts, and we had much of the press and the Gilberts were there, among other people.

Q Did you have any other public presentation of Hands Beautiful?

A Yes. Then we had --

THE COURT: Let me ask some questions about the press party.

[214]

Were there any speeches made?

THE WITNESS: I believe there was one speech.

THE COURT: Made by whom?

THE WITNESS: It was either made by myself or our public relations girl.

THE COURT: Did Mr. and Mrs. Gilbert speak?

THE WITNESS: No.

THE COURT: Were they introduced?

THE WITNESS: No.

THE COURT: How many people would you say were there?

THE WITNESS: Forty, fifty, sixty people.

THE COURT: Go ahead, Mr. Handelman.

Q You say you had another such presentation at the --

[215]

A Plaza Hotel, a luncheon for the glove buyers.

Q The trade, you mean?

A Yes, the trade.

Q To use his Honor's questions, were there any speeches made?

A Yes, there were.

Q Who made the speeches? How many speeches were there, by the way?

A Can I count them on my fingers?

Q Yes.

THE COURT: Anyway you want. Do you want a computer?

THE WITNESS: I think I gave the opening remarks --

THE COURT: That comes from being a glove man.

THE WITNESS: That's right, always with my hands.

I gave a short opening speech. Our publicity girl, Barbara Kling gave a speech, I believe, but I am not quite sure whether she gave it or not. Mr. David Gilbert gave a speech and then a girl called Arlene Fleischman, who was doing in-store promotions for us gave a speech and, as I recall, that was all the people that gave speeches at that time.

THE COURT: Do you remember what the substance of Mr. Gilbert's talk was? [216]

THE WITNESS: The substance basically was an explanation on how Hands Beautiful worked from a medical point of view.

Q Did you make tapes of those speeches?

A I think Mr. Gilbert made a tape. I never made a tape.

Q Now, Mr. Stanton, did you offer Mrs. Gilbert a job with Aris Glove?

A Ever?

MR. HANDELMAN: Subsequent to March 30, 1968 did there come a time when you offered her a job?

THE WITNESS: Yes, there was.

THE COURT: When was that?

THE WITNESS: I think it was in the [illegible] 1969 we felt it would be appropriate and helpful [illegible] a woman travel the country going to department stores educating the sales girls and Mrs. Gilbert was loquacious and likeable and we felt she would be a good candidate for the job so we offered it to her.

THE COURT: To educate them with regard to the Hands Beautiful products?

THE WITNESS: That is correct. We actually had offered her a previous job quite a few years earlier. [217]

THE COURT: We will forget that.

Q In what connection was that?

THE COURT: Is it relevant?

MR. HANDELMAN: I think it may be. I think he has the date wrong.

THE WITNESS: We once had considered opening up a glove boutique on Madison Avenue and I had discussed with her perhaps her managing the boutique for us.

THE COURT: Do you remember when that was?

THE WITNESS: No, I don't. But it was quite a few years earlier than 1968.

Q How long have you known Mrs. Gilbert?

A I think since 1963 or '4, I am not sure. [217]

Q Now this job that you say you offered her to promote Hands Beautiful around the country, was that in any way to compensate her for the ideas that she had contributed?

A Absolutely not. It didn't have anything to do with it.

Q Was it in addition?

MR. SWIRE: Objection.

THE COURT: I think he answered the question. If she is entitled to something else she is entitled to something else.

Q At the time that you offered her the job, did you consider that she was entitled to something for her idea? [218]

A I have continuously repeated to Mrs. Gilbert and also during my pre-trial deposition that I told Mrs. Gilbert that I would be fair and give her a reasonable amount for the idea that she suggested.

* * * *

THE COURT: Let's ask, after Mr. Cohen's first visit to you or after his early visits to you who did you discuss the use of Lycra Spandex with? [347]

THE WITNESS: I discussed it with my father who was the chairman of the board. I disucssed -- that is of our company.

I discussed it with Henry Oberdorfer who was our vice-president.

THE COURT: Okay.

Q That is all?

A That is all, yes.

Q When you say you discussed it, did you discuss it from the standpoint of the beneficial effects?

A I discussed it with my father from the point of view of the general overall concept of a Supp-Hose for the hand. [348]

Q But you did discuss with Mr. and Mrs. Gilbert the beneficial effects of that cloth, didn't you?

A Can you put a time element on this?

Q You did at some time discuss it with them, didn't you?

THE COURT: You should specify what time you are referring to. You mean before or after March 30th?

Q Did you, after March 30, 1968, discuss it with Mr. and Mrs. Gilbert?

A Discuss what?

Q The beneficial use or effects of the Lycra Spandex cloth. [348]

A You are talking about the therapeutic benefits or what are we talking about now?

Q Other than therapeutic benefits, were there any other benefits?

A Yes.

Q What?

A It made the hands look great. It made the hands feel great.

THE COURT: You mean those were the claims?

THE WITNESS: Yes.

THE COURT: Did you discuss that matter with Mr. and Mrs. Gilbert after March 30, 1968? [349]

THE WITNESS: Yes.

Q What was it that brought about your discussing that with them after March 30, '68?

THE COURT: I really don't see why this is proper redirect. I don't recall any of this material on cross examination.

I am fully aware of the fact that these conversations occurred. It seems to me perfectly obvious that one of the reasons, and this is what I assume you are trying to prove, is that Mrs. Gilbert made such suggestions and claims and they had to be discussed.

* * * *

372

ANNICE GILBERT, being first duly sworn, was examined and testified as follows:

* * * * *

373

DIRECT EXAMINATION

BY MR. HANDELMAN:

* * * * *

[426]

Q Now, with respect to the samples can you tell us what your discussion was? You have told us about the quality of the materials but did you have discussions about the cut or the manner of putting it together?

A Yes. There were a number of other gloves before these that were very rough in appearance and in construction, and I objected to the seaming --

Q Don't say object, just say what you said, what you pointed out, if anything, or what you said.

A I said the fingers were too short, for one thing, in the small sizes. They were going to make three different sizes, small, medium and large. And Aris Gloves cuts their small size -- their fingers are much too short for the short size. Some manufacturers cut their fingers longer.

I said, "Lari, the fingers are too short but

[427]

the thumb is cut out too wide."

In the earlier ones they were cut very badly, and I said, "This is not my concept at all. You are not doing it right. It doesn't look like anything. It's not evolving the way I had in mind."

And I tried to explain if he wanted a fine-finished glove with the appearance of a doeskin he had to

work it out entirely differently. The thumb was cut out to such an extent that the center seam almost came past the center of the palm. [427]

He said, "You know, every time we change a finger on the glove it costs us $300."

I said, "If you are not going to do this properly don't do it at all because it doesn't look lik anything. This is not a high fashion glove."

So I kept making these suggestions right along until we got better improvements on them, until we arrived at a proper glove.

THE COURT: When would you say you arrived at a proper glove? [428]

THE WITNESS: I would say before the launching of the glove --

Q Do you remember the date of the launching? What do you call "the launching"?

A The press party of the glove.

Q Before the press party did there come a time when they were put into manufacture? The manufacture was, I suppose, before the press party?

A Yes.

Q Do you have any way of fixing that date?

A Of what?

Q Of when the final glove was ordered, first batch or first order.

A No.

Q You say Mr. Stanton did adopt the changes you suggested? [428]

A Yes, he did.

Q When he did that, was there anything he said about that adoption?

A Well, he said the cost of each finger, each time he had to make a change, it cost him $300, and I said, "Well, that shouldn't bother you if you get the glove I have in mind, I mean, it will finally make you a lot of money." [429]

Q But nobody was mad during these discussions?

A No, it was all very friendly.

Q During this period you were all having dinner together and socializing?

A Yes.

THE COURT: Boring each other?

Q You weren't so bored then, were you?

A It was exciting because I thought something would evolve from it, if he followed my trend of thought on it.

Q Was there any discussion about any difficulties that the manufacturer of the moldings was experiencing in putting this particular cloth together?

BEST COPY AVAILABLE

A Yes, they had a problem, quite a considerable problem. The fabric was fraying and it was curling. [429]

THE COURT: There is no dispute among the parties as to this point, is there?

MR. HANDELMAN: No, it is not for the dispute, your Honor.

Q Did you make any suggestion as to overcoming that problem?

A I said to Lari, "Would it be possible to size the fabric or starch the fabric to make it easier for [430] cutting purposes?"

He said, "Well, that is a thought," and he did that, had that done.

THE COURT: How do you know?

THE WITNESS: Because the subsequent gloves were easier to cut, from then on.

THE COURT: I am not challenging you, but do you have first-hand knowledge that they actually sized them, or did Mr. Stanton say that he sized them?

THE WITNESS: Yes, he told me he sized them he starched them, had the fabric starched.

Q Starched the edges, you mean?

A No, he starched -- whatever they do in the manufacture of the fabric, the finishing of the fabirc. Sometimes they size it, sometimes they do other things with it.

Q When you were going through that process, were there any further discussions about the qualities or benefits that the glove was supposed to be able to produce?

A Yes. We talked about it all the time, that it would have this beneficial effect on the hands, massage the hands, diminish the brown spots on the hands, would stimulate the circulation -- [430]

THE COURT: How on earth did you people have the nerve to assume it would diminish the brown spots on the hand? Do you have any background to make that assertion? [431]

THE WITNESS: If you improve the circulation you are bound to have a better skin. The skin is an organ, the largest one in the body --

THE COURT: But you didn't have any training in that field?

THE WITNESS: I read medical books all the time and I would have wanted to be a medical researcher at one time, and that accounts for my interest in that.

* * * *

Q Without reading the writings, what are those writings, what is the writing on those papers?

A They are names of gloves.

Q Names for gloves or --

[443]

A Names for gloves, yes.

Q All of it is in your writing?

A Yes.

Q Did you discuss the --

THE COURT: You wrote that down and what did you do with it after you wrote it down?

THE WITNESS: I made two copies in better handwriting on a nicer sheet of paper and gave it to Mr. Stanton.

MR. STOCKELL: Your Honor, we object to this line of testimony. There is really no claim for having developed any trademark or name for the gloves and we don't here see the relevance. [444]

THE COURT: I understand that, and I don't regard there is a claim, but I think it is relevant to the relationship between the parties and whether or not there was, as charged here, a confidential relationship.

MR. HANDELMAN: There is the claim, though, your Honor, that she originated the name Hands Beautiful.

MR. SWIRE: It is not in the complaint, your Honor.

THE COURT: What are you referring to when you say --

MR. TRIEN: There is no specific allegation or specific claim for remuneration for that particular idea, no. [444]

Q Did you have discussions with Mr. Stanton other than the subject matter listed on these two exhibits for identification?

A Yes.

MR. HANDELMAN: I offer them in evidence.

THE COURT: Do you have a copy of the version you gave to Mr. Stanton? As I understood it, you said you copied more neatly those lists and made two copies -- [445]

THE WITNESS: No, this was my original --

THE COURT: That is the one, and you made another neat copy, or two neat copies, and gave them to him?

THE WITNESS: Yes.

THE COURT: Those are the only copies you have?

THE WITNESS: Yes.

THE COURT: When did you make this list and deliver a copy to Mr. Stanton?

THE WITNESS: I can't recall the date, but --

THE COURT: Not the exact date, but about when in the whole saga?

THE WITNESS: In the advertising --

THE COURT: Before the glove went on the market?

THE WITNESS: When they started the promotion. He wanted a name for the glove, and could I come up with something, and he specifically mentioned the word "beautiful" or "beauty", that he wanted that in the title. [445]

* * * *

MRS. GILBERT - Cross

CROSS EXAMINATION [462]

BY MR. STOCKELL:

Q Mrs. Gilbert, you have had no employment except as a housewife since 1946, is that correct?

A I have been freelancing.

Q Since 1946?

A Yes.

Q When was the last freelance job you had?

A I have done little things for small dressmakers.

THE COURT: Let me get it straight. Are you saying you freelanced full-time since 1943?

THE WITNESS: No, not full-time.

THE COURT: Off and on?

THE WITNESS: Yes.

THE COURT: And the last job you had, free- [463]
lance commission, or whatever you want to call it, when
was that?

THE WITNESS: Well, it could have been in
'48 and '49, little things during the years.

THE COURT: But nothing since then?

THE WITNESS: Well, I am always doing
something.

THE COURT: Have you done things for people
and gotten paid for it? When was the last time you
did a job for somebody and got paid?

THE WITNESS: I would say about '54.

THE COURT: Okay. Thank you.

THE WITNESS: No, that isn't correct. That
isn't correct. I have done things for semi -- not pro-
fessional establishments but private little dressmakers.

THE COURT: I don't care who it is for.
I just want to know what the facts are.

THE WITNESS: The last time I did some
fashion designing was in about 1958.

THE COURT: Now, that is correct, is it?

THE WITNESS: Yes, to the best of my
recollection.

THE COURT: You can proceed, Mr. Stockell.

Q I refer you to your prior testimony, Mrs. [464]
Gilbert, page 5:

"Q How long were you employed by Edlich & Earle?

"A Six years.

"Q How long by Mr. Finally?

"A About a year and then I went freelance.

"Q When you were freelancing, again you were designing for whom?

"A Well, I had an agent whole sold my designs to various houses.

"Q How long did you design independently?

"A I believe up until about '46 or '48. I am not sure.

"Q How many years?

"A How many years all together?

"Q Were you independently designing?

"A About ten years.

"Q Have you been employed since that time?

"A No. I got married.

"Q Have you done any designing since that time, since I think you said, '46 or '48?

"A Well, yes.

"Q What have you been doing? [465]

"A Well, I did some designing in gloves for Mr. Stanton.

"Q Is that the only thing?

"A I did some dress designing for my friends, for myself. I was occupied with taking care of my sick mother-in-law, so I didn't have too much time."

Do you remember that testimony?

A Yes, I do.

Q Are you correcting that at this time?

A No. The little jobs that I had designing for small -- were so insignificant that I didn't bother to -- I couldn't remember everything. You ran me through that thing so fast I couldn't remember half of it --

THE COURT: The fact of the matter is you have had these small jobs and no other jobs since the late '40s?

THE WITNESS: Well, I was married and I had to --

THE COURT: I just want to know what the facts are. You said you had some small fashion design jobs and those were the shall fashion design jobs?

THE WITNESS: Yes.

* * * *

Q Mrs. Gilbert, I believe you testified that [501]
you had suggested some of the advertising phrases written
by Mr. Gilbert.

A Yes.

Q I would like to read to you some of your
earlier testimony, page 43:

"Q You testified, I believe, that you had
suggested changes in the glove from time to time as
samples were prepared.

Did you have anything to do with either the
advertising or the promotion of the glove?

"A I did suggest certain phraseology
in the copy, yes.

"Q Such as what?

"A Revolutionary new concept, a fashion
glove for cosmetic effects, and such. I can't recall
offhand."

Was that your testimony?

A Yes. [502]

THE COURT: Revolutionary new concept and
what?

MR. STOCKELL: Cosmetic effects.

MR. HANDELMAN: You said page 43?

MR. STOCKELL: Yes, I did.

MR. HANDELMAN: I can't seem to find that.

(Pause)

Q Was that your testimony?

A Yes.

[502]

Q Are you telling us now that you suggested him more advertising ideas?

MR. HANDELMAN: I don't understand that.

THE COURT: Overruled.

A Not many, some.

* * * *

COLLOQUY

MR. TRIEN: Additional material had been sent to us from the defendant's attorney, being invoices from the printers of the promotion material, and our interest is in showing your Honor the fantastic extent of the promotional activity involved here. [637]

The invoices reflect truly millions of these promotional documents which your Honor has seen in the record, and I would just like to get that reflected on the record.

THE COURT: Offer whatever it is you want to offer.

MR. TRIEN: I would like to offer, and I asked Mr. Swire to bring this morning, the material he sent to me along with his letter of January 25, 1972, referred to in Items 1 and 2 of that letter.

MR. SWIRE: Your Honor, we have it here. We do not think it is relevant. It is conceded there was a substantial promotional campaign and this is on the issue of liability and I don't think that invoices from [637
the printers for statement enclosures and brochures and the like are relevant to the question of what Mrs. Gilbert

gave under what arrangement. [638]

THE COURT: It is only peripheral, at best, but it might be relevant as to whether Mr. Stanton's story is entirely credible if it were demonstrated that the day after they met Mrs. Gilbert they got in touch with -- I am just making a hypothetical statement -- with the promotional agents and said, "Last night we learned something terrific for the first time and we are not going to promote it like made." I suppose the plaintiff contends the material you have holding supports such a view of the situation.

* * * *

COLLOQUY ON DEFENDANT'S MOTION TO DISMISS

MR. STOCKELL: Yes, your Honor. [647]

We would like to move at this time to dismiss the complaint for failure of proof on the ground that there is no originality or novelty or concreteness of the idea which is claimed to have been disclosed, on the ground that the agreement on which the claim is based is barred by the statute of frauds, on the ground, also, that that agreement is unenforceable because of indefiniteness, and also because so far as the claim is for disclosure of promotional ideas, the agreement is unenforceable by reason of illegality, and also on the ground that there was no consideration given for the agreement.

It seems to us that this is at a stage for decision on the facts, because unlike most cases the defendant's story is largely of record. The additional evidence will add some detail. There will be witnesses corroborating and substantiating the story that has been told.

I think that it has appeared from the testimony here fairly clearly that Aris sold stretch gloves for many years prior to the date of the agreement, the nylon

stretch gloves, they were sold as one-size stretch [648]
gloves, and it appears that at least as early as 1955, as appears from one of the catalogs in evidence, as well as Mr. Stanton's testimony, Aris was selling one-size stretch gloves made of a stretch fabric made from the Helanca stretch yarn, so that stretch fabrics were nothing new to the defendant.

It appears from Mr. Stanton's testimony that when he first heard of Lycra Spandex, of course, this was a matter of interest to a manufacturer of gloves, a seller of gloves, and he brought this up with his supplier.

It appears from his testimony that the supplier did not try to develop some Lycra Spandex yarns during the mid-60 -

THE COURT: Are you talking about Blue Ridge?

MR. STOCKELL: Yes, during the mid-60's, '65 and '66, but that they tried to produce these yarns and -- these fabrics, but the fabrics they produced were not satisfactory to Mr. Stanton and he did not think they would do the job for his gloves.

It also appears that Aris Gloves was selling Lycra stretch lace gloves, and I believe that came in about 1965 or 1966, well in advance of the supposed

disclosure, and it was in evidence through Mr. Stanton's testimony that these Lycra Spandex fabrics were actually shown to him, he identified one of the fabrics he had seen, and he mentioned also there was a cream-colored fabric and the others he didn't particularly have a recollection of, but he did know he had seen the Lycra Spandex fabrics. [649]

Then it appears from Mr. Stanton's testimony that Mr. Cohen, who was a salesman for Blue Ridge, brought to him in December 1967 a Lycra Spandex fabric, which is a cutting of that fabric, the shocking pink, and which was a yard and a half, linear yards, and a cutting -- however, is a piece 62 inches wide --

MR. TRIEN: I am sorry to interrupt, but I think there is a prospective witness sitting in the courtroom and I would rather she not be here at this time.

(Pause)

MR. STOCKELL: It appears from his testimony that at first glance he was not particularly impressed with the fabric, but after Mr. Cohen had a rough sample prepared he became quite interested and sent a part of that cutting to his glove manufacturer to try to develop proper samples and to evaluate the cloth, and it appears from his testimony that these samples were prepared over

a period of time and submitted at various times over [650]
the period from either December '67, January '68, on up
through the spring.

Mr. Stanton's testimony is supported in part
by the letter in mid-April, which showed that he was
getting a pink smaple at that time and, certainly,
according to the plaintiff's testimony, it could not have
been a sample of the cloth found in June of that year.

It is also supported --

THE COURT: Would you repeat what you just
said? It is supported by what?

MR. STOCKELL: Mrs. Gilbert's testimony that
she did not receive any sample that was satisfactory until
sometime in June and that the gloves, samples were
developed over a period of time after that.

In other words, the plaintiff's testimony
places all of this sometime in the summer of 1968,
whereas we have seen from the documentary evidence, from
the Webco invoices, there were production orders for this
very material starting with May 6, 1968. So that it
appears that the documentary evidence supports Mr. Stanton's
story.

Also, your Honor, it is supported by Mrs.
Gilbert's testimony that only a week or possibly two weeks

after the disclosure there were already discussions under way as to the difficulties of manufacturing the sample gloves. [651]

THE COURT: Of course, one wonders why, if that was necessarily so, Mr. Stanton did not say on that famous occasion, "We are doing that already."

MR. STOCKELL: That is his testimony, your Honor. He said when this disclosure of the night mitten was made to him that the flattening of the veins was an idea and perhaps he could use it with a glove he was already considering.

THE COURT: I will have to review that. There was a dispute as to whether that night mitten was presented on March 30th or not.

MR. STOCKELL: That is correct.

Furthermore, your Honor, it appears from Mrs. Gilbert's testimony -- she says she disclosed the night glove earlier and disclosed in that connection these various promotional claims that are now being made with respect to the Hands Beautiful glove, and I think that that testimony, that Mr. Stanton said she disclosed on this occasion the idea of flattening the veins and that ties in with the idea this was the first disclosure he had of that idea, and that was disclosed to him at this

March 30th meeting. [652]

It seems to us that so far as the night glove is concerned, all disclosure of anything of value if those promotional ideas were of any value was made at that time, and if the plaintiff says that was made at an earlier time, surely the plaintiff can't collect for those when there was no agreement that is not covered by the disclosure agreement, and it seems that by saying that the night glove was disclosed earlier, the plaintiff really has limited her claim simply to the idea that she used -- suggesting that the use of some Lycra Spandex, not this particular cloth, but that Lycra Spandex be used in the manufacture of a fashion glove, and once being so limited, the idea having been commonly known, and Mrs. Gilbert having experimented with Lycra Spandex gloves prior to that time, that there was nothing of any concreteness or value -- I'm sorry, Mr. Stanton having previously worked with that.

Again, as we were saying, Mrs. Gilbert says it took Stanton at least six weeks or two months to find the appropriate fabric. She says it took a long period of time to develop sample gloves and consequently we cannot see that there is any possibility that her story can be credible in view of the fact that production orders

for this very fabric were being placed on May 6th, [653]
and thousands of dollars of fabrics were ordered during May 1967. In fact, toward the end of May 1967 there were several thousands of linear yards of this fabric ordered.

Also, it appears that Stanton's reaction to the draft agreements, when shown, was that this was a big joke, that surely this was a farce. That is shown not only by his testimony, it is admitted by Mr. Gilbert's testimony, and it appears also that from those draft agreements there was no reference to Lycra Spandex, so far as I am aware, and apparently Mrs. Gilbert, at the time at least she spoke to her lawyer for the first time, was not aware of the nature of the material.

If your Honor please, in Exhibit 52, a brochure Mr. Gilbert made up, and you recall his testimony toward the end of his cross-examination, where it was pointed out to him that in this brochure he called it all-nylon construction, 100 percent nylon, he tried to explain that was -- but I think it is evident that he didn't know at that point, and certainly admitted this in his pre-trial testimony, what the material was at that time.

Consequently, we do not think the testimony is credible that the disclosure at that March 30th meeting was

of a Lycra Spandex fabric. [654]

Thus, I think, your Honor, on taking the tesitmony, we do not believe the testimony is credible, but even if the testimony were thought to be credible, Mrs. Gilbert's testimony has so limited the idea of what was disclosed that she has limited to something that was really not novel or an original concrete idea --

I turn to the additional bases for the motion to dismiss:

1. That it is barred by the statute of frauds, and we had some testimony that for some reason Mr. Stanton casually agreed to an 8 percent of gross, and we think this testimony is hardly credible, and it is certainly disputed by Stanton, that an experienced business man would casually agree to pay an 8 percent royalty on an unprotected product, especially when he had not seen the material --

THE COURT: I don't think that is the question we have to deal with so far as the statute of frauds is concerned. We have a written instrument and the question seems to me on the statute of frauds to be whether it is reasonable -- the word "reasonable" is used -- and that is sufficient to meet the requirements of the statute or it is not.

MR. STOCKELL: I think any continuing percentage

is clearly under the cases barred by the statute of frauds. The statute of frauds is applicable here, one, because of the claim that there was a continuing percentage, and I think the cases are clear that a continuing royalty or a continuing permission is automatically barred by the statute of frauds unless that is in writing. [655]

Also, the agreement that was testified to by the plaintiff states that Stanton agreed not to manufacture for a period of five years, and that is the period of burden on the defendant, and therefore the agreement falls under the provisions of the statute --

THE COURT: The question is whether the requirements of the statute have been met by what does exist.

MR. STOCKELL: In addition to our position that certainly any percentage is barred by the statute of frauds, I think that any amount whatsoever -- there is no agreement here --

THE COURT: You mean you think per se an agreement which says, properly drawn and everything, that "I will pay you reasonable value for what you give me" fails to meet the requirements of the statute of frauds?

MR. STOCKELL: I do.

THE COURT: I have not studied the cases sufficiently to be sure myself, but I am inclined to feel

differently. [656]

MR. STOCKELL: That is true insofar as contractual -- that they would pay a reasonable share of profit -- it is phrased in many different ways in the case, but there was, as Mr. Handelman argued, never any agreement as to the amount of the compensation, and merely an agreement which states a reasonable return, we would not and do not think is a sufficient definite agreement --

THE COURT: It certainly is in other instances I have dealt with.

MR. STOCKELL: If you have something where there is an objective basis for determining that reasonable amount, that might be a different story.

THE COURT: It would seem to me the implication would be that it would have to be objectively determined.

MR. STOCKELL: There is a difference between the parties as to what is reasonable here.

THE COURT: I understand that, and that is why you are here, but it doesn't mean the Court can't determine what is reasonable here.

MR. STOCKELL: We do not believe the Court can make the contract for the parties, your Honor.

THE COURT: I am not talking about the Court making the contract. I am talking about the Court

construing the contract and determining if there is one and if it is enforceable, what the amount would be. There is no need for you and me to argue. I will read the cases and see if I come to the same conclusion as you do, as to whether the use of those words is fatal. [657]

As I said, I was inclined to take this issue up at the very beginning to see if we could not avoid a trial altogether, and I would have expected defense counsel to move to dismiss on that ground, or ask for summary judgment, and I have not had a chance to look at the cases, but I have asked my clerk to do it and, at least, at this reading, we feel that the statute doesn't outlaw the kind of memorandum that we have here.

I know that some of the cases you referred us to were agreements to agree and there is no question that that is simply nothing, but I don't regard Exhibit 1 here -- and I don't think you are arguing -- as an agreement to agree. You may argue it is too indefinite to be enforceable -- or maybe you do argue it is an agreement to agree --

MR. STOCKELL: I think it is an agreement to agree, because they could not agree on the compensation when he didn't know what the idea --

THE COURT: My reaction is that unless I find that the New York cases, about which I am perfectly

candid to state I am a little rusty on because I have not had occasion to deal with them in a few years -- unless they hold the use of that language is an agreement to agree, I would simply construe it as meaning it was the equivalent of quantum meruit, and that would have to be objectively determined whether by calling experts from the industry and asking them what that is worth, if she gave him anything at all. [658]

MR. STOCKELL: It is our position that the use of the term "reasonable return" is not reasonably definite.

THE COURT: That would save me a lot of work, if you are right.

MR. STOCKELL: Under the Ginsberg case, which has been cited in our briefs, it has been pointed out by the Second Circuit, Mr. Justice Marshall, that an essential term is one which affects the rights of the parties and which is sharply disputed, where the evidence is in doubt as to what the answer to it is, and I think that certainly under that case there is certainly a dispute as to what is a reasonable amount, and it certainly affects the rights of the parties.

I would call that an essential term, and that not being spelled out, the agreement is unenforceable.

THE COURT: What is the citation of Ginsberg? [659]

MR. SWIRE: 341 F.2d 825.

THE COURT: I will take a look at that during the recess.

MR. STOCKELL: Insofar as the essential terms are concerned, also, and I understand clearly what your Honor said at the beginning of the trial, we feel that the failure to indicate anything about the nature of the disclosure to be made, remembering that all past disclosures had been, say, a design which, according to Mr. Stanton, was only worth about $20, where you have just a broad, wide-open disclosure, "I will disclose to you an idea," without saying it is an idea for a glove, that it is a design of a glove, and there is a sharp dispute as to the nature of what was disclosed and the nature of what was disclosed will certainly affect the rights of the parties, I think there is, again, an essential term that is lacking.

The other point which I would like to emphasize, and I have referred to this previously, is the failure to disclose anything, even what was claimed as being original or novel or concrete. The originality and novelty we referred to, where Lycra Spandex was commonly used, commonly known. It was used in various materials

on the market, was well known, and Mr. Stanton was already selling Lycra Spandex gloves, he had his supplier prepare Lycra Spandex knit fabrics for him which he wouldn't accept. There was nothing new, nothing original, and certainly where Mrs. Gilbert says all she said was "You use a Lycra Spandex material in your glove, and whatever that material is is up to you to find it, that is not my business, but you go out and find a proper Lycra Spandex material" -- that was not a very concrete idea, your Honor. [660]

Also, your Honor, the further argument has to do with the promotional ideas. So far as we can see, Mrs. Gilbert says she disclosed the idea that a Lycra Spandex power net, she called it at the time, in the knit mitten, would have the massage effect, the effect of whitening the hands, improving circulation, all of the claims, apparently, compressing the veins, particularly -- all of those claims are the same claims she suggests now should be made with respect to the fashion glove.

Certainly she has no right to recover with respect to ideas she said were disclosed previously.

Further on that point, your Honor, we don't think she has any right to collect on any ideas which it was illegal to use. For one reason, your Honor, the use of

these ideas would be illegal and, therefore, had no [661]
value; and, second, the agreement with respect to
disclosure of illegal promotional ideas calls for per-
formance of illegal acts and, therefore, the agreement
is void by reason of illegality.

So I think, your Honor, on the basis of these
various points, that the case is ready for decision and
we ask that the complaint be dismissed.

THE COURT: Thank you.

Which one of you is going to answer?

MR. TRIEN: Your Honor, I have some remarks
about the legal aspects of this thing --

THE COURT: In other words, you are arguing
the motion to dismiss?

MR. TRIEN: Yes, your Honor.

The one element that the defendant's attorney
leaves out in the discussion of whether or not the
statute of frauds is applicable or whether or not the
agreement is too vague or too indefinite to be
enforceable is that we are dealing here with a
relationship of trust and confidence. In other words,
when you are talking about seeking protection for
an undisclosed idea you are talking about a situation
where one party is taking the other party into his

confidence and the Courts have treated those kinds of [662]
situations in an entirely different way than they
have in normal commerical dealings.

For instance, if a man agrees to sell an item, an item that has been standing before the both of them, they can agree on the price, discuss it, and if they come to agreement, fine; if they can't, they have no agreement. But where you are dealing with an attempt to protect an undisclosed idea, it is completely impractical to suggest any such agreement will be invalid unless the parties agree on a price, because one of the parties could not even consider what price he wants to pay because he has no idea what the idea is.

In other words, you are talking about -- the suggestion is being made the agreement to protect an undisclosed idea, unless the parties do the very impractical thing of agreeing on what the price is, is invalid, and that is not the case.

The law does protect the disclosure of undisclosed ideas and the way it has done it is to require payment to be made for that undisclosed idea if it is utilized and if it is given in a situation where there was trust and confidence elicited prior to the revealing of the ida, and if the idea is given in the context of an

understanding that in the event the idea is utilized, [663]
"you will be paid for it."

This line of cases is an entirely different line of cases, as the Ginsberg case, and these other cases, where you are dealing with a known quantity, where the parties agree on what they are going to buy and sell it for, or they don't agree. You cannot impose such a requirement in a situation where the subject matter, the distribution to be given, from one party to the other, is an idea which has not yet been disclosed.

Mr. Gilbert, who drew this famous document, is not a lawyer, but I can say to your Honor that if he came to me and said to draw such an agreement for him to protect an undisclosed idea, I wouldn't know what else to put in that agreement. In other words, he put in some basic protections here.

He said, number one, she is about to disclose something of confidence, which expressly -- we don't need an inference that there was a relationship of trust and confidence, it expresses it in the agreement -- says, Mr. Stanton accepts this in confidence and agrees not to reveal it for a period of five years. If that is not a statement of trust and confidence, I don't know what is.

In addition, he agreed "in the event I utilize it, I will give you a reasonable return."

Whether or not you construe that to mean that what the parties had in mind was that Mr. Stanton would not reveal it or utilize it unless he entered into an agreement to pay her a particular sum of money for her idea or that the agreement was that a reasonable amount would be paid -- I mean, I think there was a contemplation here.

THE COURT: Your view is that if it were to be used it would be paid for on a reasonable basis?

MR. TRIEN: Yes, your Honor.

THE COURT: If it were not to be used, it would not be paid for but not revealed?

MR. TRIEN: For a period of five years.

I wouldn't know what else to put in such an agreement. How else could a lawyer protect her on the thing? You cannot require Mr. Stanton -- if the requirement was, your Honor, that the parties have to agree on the price before there would be any protection of an undisclosed idea, I daresay the commerce in these great United States would not be as successful as it was, because people would look to only the most scrupulously honest people to reveal their ideas to, because they

couldn't rely on any legal document to protect them.

We have cited a number of cases to your Honor, the Robin case, a New York Court of Appeals case, in 1965, Robin v. Frank Cooper, and in that case the Court of Appeals held that the proper measure of damages was the reasonable value of an idea. There they were dealing with an idea for a television series, and I must point out to your Honor there was no written agreement in that case; the Court simply found a liability to pay a reasonable return for the idea because of its factual finding that the parties dealt with each other in a situation of trust and confidence and with an expectation that if the idea were utilized that the fellow would be paid for it.

Another case we have cited to your Honor is Cole v. Phillips H. Lord, an Appellate Division case, where the Court found another oral contract, again not as strong as this case, under which a man entrusted his idea to the defendant. In that case the idea was for a radio program entitled "Mr. District Attorney," which I used to listen to as a kid, and the Court expressly dismissed the idea in that case that the contract was too indefinite because there was no statement as to what the consideration would be. There again, your Honor, the Court pointed

out that the parties were dealing in a situation of trust and confidence with an expectation of payment in the event of utilization of an idea.

Penberthy v. U. S. Rexall Drugs is another case in the Appellate Division in 1968. In that case the plaintiff had put in a system, a technical system for melting glass in a glass furnace, and there was a written agreement in that case which provided that "I am going to put the system in one of our furnaces for X amount of dollars and in the event you want to put them in your other six furnaces, you won't do it unless suitable arrangements are made with me." In other words, the man was revealing this new system he had and the agreement was that the fellow would not utilize his ideas without making suitable arrangements. The Court found liability even though suitable arrangements --

THE COURT: Is that the actual phrase?

MR. TRIEN: Yes.

--"suitable arrangements" was hardly a phrase delineating the amount of payment to be made, any better than "reasonable value," your Honor, and the Court nonetheless granted the plaintiff the reasonable value of his idea.

In other words, if you look to the generalized

language of a normal commerical case where you are dealing with a known quantity, selling a car or an item both parties can look at from all aspects, certainly that general language requires the agreement on all terms, including price, but that requirement is not imposed in these kinds of cases.

Now, commenting on the evidence, your Honor, I would just refer your Honor specifically to those two draft agreements.

The fact that those two draft agreements were drawn up admittedly at Mr. Stanton's requrest -- the man did admit that he requested the drawing of the document --

THE COURT: I understand that, but if you are implying that he requested it include the terms --

MR. TRIEN: No, just that an agreement be drawn up.

That admission on his part, I think, is totally inconsistent with his whole theory of the case, which is that what we are dealing with here is a tiny idea given to him by Mrs. Gilbert, that is to say, "In my advertising for this glove I have had in mind since 1965, when I spoke to Mr. Winkler" -- who, incidentally, is deceased --

THE COURT: You are not suggesting Mr. Stanton put some poison in his coffee?

MR. TRIEN: No, I am just suggesting his unavailability. I am not suggesting it, but --

The concept that the defendant is seeking to sell to your Honor, that what was given here by Mrs. Gilbert was this one little idea to include in their advertising three or four words, to wit, that this glove which he had been working on for all these years would depress veins and, indeed, there was such a claim made in a number of promotional materials -- those two or three words, and Dr. Lubowe made them say "temporarily" -- the suggestion by defendant that having been given this miniscule idea which was virtually unimportant to them in the context of this total situation, that Mr. Stanton said to Mrs. Gilbert, "Go have your lawyer draw up a contract so that we can determine how much I am going to pay you," is, to me, completely incredible.

If the man said, "I am happy you gave me the idea of compressing veins, because it fits in with my entire concept," he would say, "I will give you $25, $25,000," which would have been ridiculous, but he would have said, "I will give you an amount of money and I will write you a letter to verify it" or "I will send you the

money," but he wouldn't tell the lady to go back and have her lawyer draw up a contract. Having a lawyer draw up a contract contemplates a continuing relationship which needed some clarification by memorializing that relationship in a written document, and that is what happened here.

Mr. Stanton, when he got that first contract back, didn't like the fact that it indicated she was licensing what seemed to be a patentable idea, and he said, "Go back and have your attorney draw up another one," and then the testimony is in conflict as to what the parties agreed this percentage was, but the only point I make to your Honor is that these contracts --

THE COURT: I understand your point.

MR. TRIEN: All right.

Another aspect of this thing is this famous pink glove. Contrary to what Mr. Stockell said, what is involved here is that Mrs. Gilbert says that she not only gave him the idea of a glove that would have a cosmetic and therapeutic effect, or at least could be claimed to have it, she also said, "I have the right material for it and it is in my girdle, and I will make you up a sample of it," and she says she did and gave him that sample, and she told him it was made of Lycra

Spandex. Actually, it is made of Lycra Spandex and nylon.

Then Mr. Stanton goes out and either through the utilization of Mr. Cohen, or whoever, finds out that Webco is the manufacturer of this stuff, and embarks on a tremendous program of development.

THE COURT: You are suggesting that I can infer that was --

MR. TRIEN: Yes. I am not saying the testimony is 100 percent clear on this, because Mr. Stanton has made what I conceive to be a remarkable number of admissions in this case with respect to saying he agreed to pay Mrs. Gilbert a reasonable amount of money, and again, your Honor, those admissions, which she said were made over a substantial period of time -- we are talking from March 30, 1968 until the parties parted in April of 1970 -- what is that? --

THE COURT: Two years.

MR. TRIEN: -- two years, over which Mr. Stanton kept saying to her, "Don't worry, trust me. I will pay you. You will get your reasonable sum."

If what they were talking about was this one little idea, depressing the veins, there wouldn't have been that long conversation. It is incredible to think --

THE COURT: I understand that and that is a good, logical argument.

Let's get back to the pink glove.

MR. TRIEN: Now, the pink glove. Mr. Stanton says that, despite the enormous number of sample gloves made prior to the time they went into full production, which is reflected in these exhibits, that there were many samples made over a long period of time, the only one he can come up with is what has been marked as Plaintiff's Exhibit 51, and the reason, he says, why he knows that this pink glove was made prior to the time that Mrs. Gilbert ever gave him a suggestion about this glove and the use of the material for it is because of its startling color.

I would refer your Honor to a number of exhibits. One is Exhibit 5 for identification -- I'm sorry, Exhibit 25 in evidence. That is a letter dated April 17, 1968, from Mr. Stanton to Mr. Kramos.

Mr. Stanton says in the letter, "When are you going to ship the sample of the pink stretch glove of which Mr. Hammond sent you the cutting?"

THE COURT: What do you think that proves?

MR. TRIEN: It certainly proves that a pink sample stretch glove was received by Mr. Stanton subsequent

to April 17, 1968. It doesn't prove beyond a shadow of doubt that it was this glove --

THE COURT: Nor does it prove when Mr. Cohen came in with the material and when the idea was decided to go ahead on that glove.

MR. TRIEN: We have an invoice, your Honor, which I can't put my hands on at the moment, from Webco to Aris, reflecting the deliverance of pink sample material to Mr. Stanton in a month much later than May of --

MR. SWIRE: Might I interject, your Honor: Since Mr. Trien is fully aware at his request Webco went through all the invoices that said "pink glove" and identified them as not being of that color --

MR. TRIEN: That is not the testimony at all, your Honor --

THE COURT: I won't accept representations of either of you.

MR. TRIEN: That was not Mr. Robbins' testimony, your Honor.

THE COURT: Well, you either call a witness or forget it.

MR. TRIEN: As the record now stands, your Honor, there are a number of invoices in here which reflect the deliverance by Webco to Aris of pink material

at a date subsequent to March 30, 1968, and indeed as late as 1969.

THE COURT: That may be, but pink material is not necessarily shocking pink.

MR. TRIEN: That is the case, and I made an effort during discovery to try to put my finger on it, and your Honor will find the result of that when Mr. Robbins is brought here.

The only point I would make to your Honor is that there are a number of documents in here, as well as the exhibit produced by Mrs. Gilbert herself of this pink material in a chopped up sample form which had been given to her at a date obviously subsequent to March 30, 1968.

THE COURT: I don't quite understand what you think that would prove. If Aris gave it to her, what would it prove?

(Pause)

THE COURT: With regard to the pink material --

MR. TRIEN: Exhibit 41?

THE COURT: Yes.

I don't understand what you consider to be the significance of the fact that Mrs. Gilbert received it.

MR. TRIEN: It only has this significance, your Honor: It impeaches the credibility of the story given by Mr. Stanton that the way he knows that Exhibit 51 came into existence in December 1967, or therabouts, is because of its color, and Exhibit 41 being of the same color was a sample given by Mr. Stanton to Mrs. Gilbert, I think she testified it was in about May 1968 --

THE COURT: I don't find those two facts, if they are facts, necessarily inconsistent. A piece of it might have been lying around and he gave it to Mrs. Gilbert.

MR. TRIEN: I think it is more probably in the context of the relationship that Mrs. Gilbert's testimony is correct, that Exhibit 41 represented one of the samples given to her by Mr. Stanton as they were being made in order to elicit her comments about their development of this glove.

So Exhibit 41 having been made sometime in

May 1968, I am saying to your Honor --

THE COURT: Exhibit 41 is a pretty sad-looking thing. Exhibit 51 is something else again.

MR. TRIEN: Sad as it may be, I think it is clear that what this is is a sample glove that had been taken apart to make a point to somebody. That, at least, was Mrs. Gilbert's testimony.

THE COURT: Can you wind it up now, so that we can take a short recess and begin with the witnesses?

MR. TRIEN: I would make this point with respect to a phrase utilized by Mr. Stockell in his argument. He says there is no consideration here because the idea given by Mrs. Gilbert to Mr. Stanton was not, as he put it, novel, original or concrete. Those are terms utilized as a common law description of what an idea has to rise to in order to be a property right.

We are not dealing with that in this situation. If we were talking about conversation of a property right, you would have to find out whether or not you are dealing with an idea which was novel in the world, that is to say, an idea which was virtually concrete enough and novel enough to be patentable, or at least entitled to the common law description of it as a property.

We are not dealing with that in this case. The cases we have cited to your Honor in our brief reflect that when you are dealing with a contractual obligation to pay for an idea given to you, there is no requirement that that idea rise to the dignity of being a property right or a patentable idea.

THE COURT: If you assume the burden openly and voluntarily, you can assume whatever responsibility --

MR. TRIEN: Right. You are dealing with an undisclosed idea, so you don't know what burden you are assuming.

There is a requirement that the idea have some value to the defendant, and that is the only requirement. The only issue here is whether or not valuable consideration was given and the idea given by Mrs. Gilbert constitutes that valuable consideration.

I don't think there is any question that Mr. Stanton, in or about March, the end of March, 1968, was motivated to do a lot of things to develop an advertising program, to make a lot of samples, to get an exclusive on the product from Webco, which they got in October of 1968, to have conversations with Mr. Chanler, as these documents reflect, soon after March 30, 1968 -- he did an awful lot of things for which there is an

awful lot of written confirmation subsequent to March 30,1968, and that written confirmation confirms not only that he did it, but that this was the initiation of the project.

The only thing to counter that is the statements made by Mr. Stanton, which obviously are self-interested --

THE COURT: So are Mrs. Gilbert's.

MR. TRIEN: Yes, but she is corroborated by a lot of documents insofar as the activities of Mr. Stanton subsequent to March 30, 1968.

THE COURT: I will look that over and see whether I agree with that conclusion.

MR. TRIEN: With respect to the 8 percent agreement which is claimed by Mrs. Gilbert, that testimony I think is relevant from two standpoints.

One, assuming that value is at issue in the case, the agreement was reached subsequent to the time that the idea was given, at least is alleged to have been reached subsequent to the time when the idea was given, and assuming your Honor finds such an agreement was reached, I think that would be a valid, oral modification of the written agreement.

In other words, the parties had agreed on what they conceived it originally to be, and I would point your

Honor to the fact that Mr. Stanton said, "Draw up agreements," indicating an expectation on his part that he was dealing with a going relationship, which could only mean a payment in the future out of future profits or future gross, or whatever.

The suggestion that the consideration given by Mrs. Gilbert was illegal, I think is ludicrous, to the extent that she gave him the idea of marketing a fashion glove out of this particular material which could be claimed to have certain cosmetic and therapeutic effects upon the wearer of the glove. Those claims would not be illegal if made upon proper verification.

Now, there are only certain ones -- in other words, the claim is being made that the suggestion given to Mr. Stanton required him to do illegal acts.

THE COURT: I don't get that idea at all.

MR. TRIEN: That is what he said.

THE COURT: No, that isn't. My understanding is that Mr. Stockell's position is that the claims made by Mrs. Gilbert were exaggerated to a point that the FDA held them to be misrepresentation, and to that extent they were illegal.

You may say there was a good deal more that she gave, but that is a different thing than stating the

the company was obliged to follow them.

He means those are the ideas she gave and they turned out to be held by the Government, at least, to be misrepresentations.

MR. TRIEN: With respect to that, your Honor, many claims other than those referred to in the FDA letter, which is in evidence, were made prior to the letter and subsequent to the letter --

THE COURT: She just tempered them down.

MR. TRIEN: There were three words they had to take out, but the basic thrust of the advertising was basically the same afterwards as it was before.

THE COURT: That is what I find is the general value of the FDA.

MR. TRIEN: They were so solicitous of the American consumer that instead of allowing them to say the glove would make your skin smoother and prettier that now they say the glove makes you fell your skin is smoother and prettier.

THE COURT: There has been a good argument, and I think I will have to terminate it now. We really have to get on with the rest of the business here.

I have concluded that subject to my reviewing the technical legal questions raised by some of the argument

that, at least on the facts, the plaintiff has met her burden of establishing a prima facie case here. I may say I think some of the questions are close but, nevertheless, I do believe plaintiff has established a prima facie case, and I will be prepared to hear the defendant's witnesses, and we will take a short recess at this time.

* * * * *

MR. SWIRE: We offer Defendant's Exhibits W through NNN for identification in evidence. [777]

THE COURT: They all relate to what, Hands Beautiful?

MR. SWIRE: No, your Honor. They relate to general

advertising or promotional material starting in about 1960 for Lycra Spandex support hose and related items showing the notoriety and type of claims being made.

THE COURT: In other words, intended to establish what the general knowledge of the subject was?

MR. SWIRE: That's correct.

MR. HANDELMAN: Your Honor, I object to this offer. That there has been Lycra Spandex around for some time is something of which your Honor can take judicial notice, There is nothing to show that if it were offered for anything it should be offered to show that Mr. Stanton didn't need this information from my client and that it was his common knowledge, but there can be a million ads about Supp-Hose --

THE COURT: I think it makes it much more likely to believe that Mr. Stanton had already been introduced to this idea. I think it certainly is relevant. It isn't fully persuasive. Nobody can be sure that just because something is on the front page of the Times every day that it comes to the attention of somebody in New York.

MR. HANDELMAN: This is not being offered in that way. It is being offered about other products. The fact that it was used in other products doesn't mean--

THE COURT: As I understand it, one of the very

points the plaintiff makes is that she fortified her position by suggesting how many different ways this material can be used and if it is relevant onone side, it is certainly relevant on the other.

MR. HANDELMAN: She suggested the various uses, your Honor, were ones that had not been used before. They are not coming along to show that there were chin straps and body suits or something else.

THE COURT: Even you and Mr. Trien at the very bottom agree -- at the very least, I should say agree with defense counsel that you must prove -- that is, that Mrs. Gilbert gave something of value to the defendant, and I think this material is relevant on that point and I certainly don't expect to sit and pore over it but it is relevant and I will receive it as evidence before me.

MR. HANDELMAN: I just add this, your Honor: the relevance of the material for this case and for this situation is hardly established by the fact there were ads in existence in these various places. There is not even any evidence in this case that Mr. Stanton reads the Times over Women's Wear.

THE COURT: There certainly has been testimony that he reads Women's Wear Daily regularly and I cannot

take judicial notice of the availability of Lycra Spandex, but perhaps taking judicial notice on the basis of personal experience as a former attorney who, like you gentlemen, had clients in the textile file and I know what the significance of Women's Wear Daily is in the textile field and it is altogether appropriate that I should see what appeared there during this period of time.

The exhibit is received, but please don't come near me with it.

* * * * *

N A T H A L Y O. R O B B I N S, called [889] as a witness by the defendant, being first duly sworn, testified as follows:

THE COURT: Will you be seated, Mr. Robbins?

DIRECT EXAMINATION

BY MR. STOCKELL:

Q By whom are you employed, Mr. Robbins?

A Dan River Mills, Webco Knit Division.

Q How long have you been employed by the Webco Knit Division?

A Webco since 1952; with Dan River, due to a merge of corporations, 1965.

Q In what capacity are you employed by Webco?

A My current position is Executive Vice-President, Marketing.

* * * * *

CROSS-EXAMINATION [905]

BY MR. TRIEN:

* * * *

Q Were any steps taken by your company as a result of requests made by Mr. Stanton to do something in the manufacturing process in order to avoid the curling problem? [915]

A Nothing we could do.

THE COURT: I take it that the curling problem was one widely experienced and discussed in the industry?

THE WITNESS: That is correct.

Q But do you know whether or not the curling problem eventually was solved by Mr. Stanton?

A You got the answer in your hand in that pink glove. He had to solve it.

Q In other words, this was a problem that he had in the beginning with his manufacturing?

A I don't know. All I can state from my knowledge is I know the fabric curls when tension is put on it, and having seen sewing machines and manufacturing techniques and sewing procedures generally, I would say that a certain amount of tension had to be put on it in the process, normal, routine process, and that would render the cloth in the curled state, so it would seem to me if they were more careful, if they fed it into the sewing machine more slowly, these were the suggestions that we

and duPont were making at that time on how do you sew Lycra.

THE COURT: Treated it kindly?

THE WITNESS: With tender, loving care.

And this was the ultimate answer, and I would say that the girdle area was easier because of a larger part, we had people to this date who will not run our tricot fabric in girdles because they have not been interested enough to solve the tender, loving care concepts, which is time and money, I guess.

* * * *

SUMMATION - Mr. Handelman for Plaintiff

THE COURT: All right, thank you. [1053]

You are free to take them although they are marked court exhibits.

Gentlemen, I look forward to hearing you.

MR. HANDELMAN: If it please your Honor, I think the plaintiff has established all the elements of its case by better than a fair preponderance of the evidence.

First, the agreement between the parties, which is in writing, Exhibit 1, we finally have reached the point, I believe, where I can fairly say to your Honor that even Mr. Stanton acknowledges his signature. I say it that way because you remember there was a time when he said it looked like it and all that sort of thing, but at any rate I think that can be considered a fair admission now and there is also evidence that after the idea was

BEST COPY AVAILABLE

eojb 2

given, and I am talking now about that lovely friendly dinner at the Right Bank, there was an agreement as to 8 per cent on the sales.

Now, Mrs. Gilbert testified very clearly as to the idea given and I think it is fair to say that the idea was that Stanton should manufacture a glove of the type of material which she had in her girdle which we now have established is Exhibit 3 and established that it is a Lycra Spandex nylon fabric, very close or similar to that which is up today being used in this very successful glove.

Along with the idea that he should so manufacture, she also advanced the idea that it should be marketed as a stretch glove which would impart some cosmetic or therapeutic benefits to the wearer thereof explaining that those benefits would come, of course, from the contraction of the material by its very nature.

And that the nature thereof was to create a massagic effect.

She explained this at the dinner meeting and in various writings prepared by her and her husband. Some of the documents in which these explanations and promotional ideas were made contained questions, not only questions, but also comments in Mr. Stanton's own handwriting and many of these documents, which are in evidence, were, as

eojb 3

your Honor will recall, produced from Mr. Stanton's own files.

Now, on the Monday following that Right Bank dinner, March 30th, she sent him this excision from the girdle made into a mockup of the glove and also retold to him or suggested to him, if you will, the possibility of body suits and chin straps and face masks, and peds and the like and there has been no denial on Mr. Stanton's part that I can find anywhere in the record that she didn't suggest those things and oddly enough we had, I shouldn't say oddly enough, logically enough Mr. Somark testified that he made some of those side items and at the proper time, I think there is also no question that though maybe there wasn't this great success with chin straps and face masks, and peds, there was a very marked success on body suits, but that hasn't come out, I don't think, in this part of the case.

I think your Honor can take judicial notice if your wife has bought any of those, they are quite expensive, too.

Now, the idea as given and that is always the test, it is not only what someone says he gave, but what did the other fellow utilize and there is no question in this record that after the 30th of March 1968 Stanton

eojb 4

utilized that Lycra Spandex material, which had previously been used only in what they call foundation garments and that includes girdles and I won't bore your Honor with what other things might be foundation garments.

But at any rate the record is also clear that this material had never before been used or manufactured or marketed under these kinds of claims in gloves.

Now, the promotional materials are certainly numerous. They go from Exhibit 5, for example, to Exhibit 21 and they reflect the very cosmetic and therapeutic claims suggested by Mrs. Gilbert.

Exhibit 10, for example, is a brochure of which Mr. Stanton admitted they had printed hundreds of thousands and they utilized them to reveal and to excite the public with the very claims suggested by Mrs. Gilbert.

There has been a little talk here about what's new and what's unique. Again the eating is the proof of the pudding. The sales of Hands Beautiful and Iso Toner gloves in the very first year amounted to approximately a million dollars and that was, if your Honor please, 14 per cent of the Aris gloves. In other words, I think Mr. Stanton told us that they did a little over 7 million and here was a million in this brand new product in the very first year.

Now, that should be viewed, too, in the light of the fact that Aris was an old time glove manufacturer. They had started before Mr. Stanton. His father started that business and they were pretty thorough and they had a factory in the Phillipines and they had all the accoutrements for the promotion of gloves and your Honor might wonder why this big mogul in the glove business would have to go to this little lady and her husband to discuss what can be done, but ideas come, as your Honor knows, from strange places and there is no magic about it. No one has a corner on it. I suppose the biggest of the corporations in this country have achieved ideas from little people all around the country.

Now, the other thing that indicates the novelty of this thing is to examine this whole company's advertising budget and they have admitted that it was increased. The budget on this glove alone was increased from around 100,000 in the first year to close to, I don't know, 690 odd thousand dollars, close to $900,000 in 1974.

Again we know that companies don't foolishly spend a million dollars or close to a million dollars on advertising unless they figure roughly that it will be perhaps 10 per cent of their gross.

THE COURT: It didn't actually turn out to be,

did it, did they sell $9 million worth of gloves?

MR. HANDELMAN: We don't have the '74 figure, your Honor, but I surmise from what I can learn from advertising people, that it will be ten times the advertising. That was just the budget, your Honor, as I understood it, so it will be ten times that for '74.

Now, all of that certainly provides a valid basis for the explanation as to the sales which, as you say, we don't know the figures now, and it also more importantly indicates the value of this idea suggested by Mrs. Gilbert.

Now, Mr. Somark identified Exhibit 3 --

THE COURT: You mean Mr. Kramos.

MR. HANDELMAN: Mr. Kramos, Exhibit 3 as the -- well, we have been over that this morning so I won't beat a dead horse.

THE COURT: It is Lycra Spandex.

MR. HANDELMAN: Right. We have also made reference and I am not criticizing the other gentlemen from Webco that he didn't want to say with definiteness about it.

So at any rate there is no doubt that we are talking about the same thing when we talk about what was used and what Mrs. Gilbert suggested.

Now, your Honor, another way of looking at this

is to examine the defenses aimed at Mrs. Gilbert in this matter. They say the idea is not, as I have just outlined to your Honor, as Mrs. Gilbert claims, but that the only thing that Mrs. Gilbert told him, that is to Mr. Stanton, was with respect to a night mitten.

Your Honor will recall she said that she told him about some six or twelve months before along with some other contributions that she made to his welfare in the form of ideas and for which she complained that she had not received any compensation and which she pointed out was the real motivation for Exhibit 1, in other words, insisting upon something in writing because she had had this trial period of being a dear friend.

Now, the power mitten, to talk about the power mitten, the night mitten, rather, is a little ludicrous. There we had a sort of a little sack affair which got its power, as you say, out of this material called power net, of which we have an example in the exhibits, and that merely, the power net part of it, merely went around the top of the hand and over the palm and it utilized some kind of a hand cream.

In other words, we are talking about bananas and oranges. There is no similarity between that matter and this. To say that this is the thing that she really told

him about and if your Honor will recall the part was that he liked the idea; that it would flatten veins.

Now, that is so much frivolity. It shocks I think anyone's consciousness to come in here and try to set that forth as a defense. That she was really talking about that and not about this fashion glove which had this therapeutic quality.

Now, he admitted that between March 30th and April '70 he continuously assured Mrs. Gilbert of payment for her idea telling her he would be fair to her and that is in the record, page 79 and other places, and suggested even that she have her attorney prepare a formal agreement. That testimony is at page 181.

That, as your Honor will recall, resulted in her having an attorney prepare an agreement under date of May 1968 which is Exhibit 11 in evidence. That called for licensing Aris to manufacture and provided for the 8 per cent royalty which had been discussed at the Right Bank meeting on March 30th and he didn't say before he asked her to prepare it to prepare an agreement just as to the mitten or he didn't say to her, as he had every opportunity to say, you didn't give me any idea. Even he doesn't testify that he ever said to Mrs. Gilbert, well, you didn't give me any idea, it was always trust me, I will

be fair to you, we will work it out. His lawyers are busy and all that sort of stuff.

When he finally gets the agreement the big criticism is it's a big joke bec ause, and correctly so, she had no patent and therefore as a technical matter she couldn't license and that led to the palaver about go back and have a new agreement made.

In connection with that it is a little odd, too, to his dear friend her husband he says, have your lawyer leave out the percentage otherwise indicating as business-men I suppose both east and west of Seventh Avenue do he intended to have a little negotiation with respect to the generosity he had exhibited on March 30th at the Right Bank.

He admitted that he asked her to get this agree-ment and he talked about his attorney in San Francisco being busy. Again he didn't talk about anything being wrong with that agreement. He didn't talk about the basics that you didn't give me this idea, why do we need an agreement, but his lawyer was very busy.

He told her husband and we find out, strangely enough, that the lawyer is a fellow named Guggenheim who is his cousin in San Francisco and again Guggenheim is very busy. That's all at 557. When you read that kind

eojb 10

of what I call palaver, your Honor, it certainly shocks credibility that someone would expect that they could sell that kind of bill of goods. That would be great salesmanship.

He admitted that he involved both Mr. and Mrs. Gilbert in the advertising and the development of the glove.

He admitted sending her many samples and they are in evidence as Exhibits 30 and 47 and there are others some of which he gave directly and some he transmitted on his morning visits to her husband when he was taking his yoga exercises.

He admitted that he discussed many of these things with both of them. Now, again you will recall that Mr. Kramos, who came on the scene here much later than Mrs. Gilbert, described that he made changes at the request of Mr. Stanton with respect to the size of the fingers and also with respect to the manner, and I am not proficient enough to use the technical terms, but the type of cut for that thumb. Apparently there is more than one way that one can manufacture a thumb. Strangely enough, that fitted in exactly with what Mrs. Gilbert testified to as telling him where her criticisms of the first sample.

Now, as your Honor recalls, Mrs. Gilbert testified that she provided a list of names which included the Hands Beautiful and in all fairness she stated that Mr. Stanton wanted the word beautiful in there and in talking about Iso Toner, she quite logically explained how they started out with isometric and I looked at one of those exhibits today and it did have the word isometric there and they got a variation of that. Exhibits 94 and 95, for example, are a list of names in her writing and which she says were at Stanton's request and in fact they are on Aris paper.

Now, he admitted discussing -- it's odd that he should admit discussing the development and the advertising of something that she had nothing to do with. She didn't give him any idea for. Even if your Honor recalls those Lubow reports where they went and got some doctor to make a test on people to see if there was any effectiveness in the use of this glove for women and those exhibits I think run from 52 to 77WW and the advertising copy was prepared at his request and he admits at page 165 that he specifically discussed some of these things with Mrs. Gilbert.

Your Honor will recall how he always shied away and tried to make it just a discussion with Mr. Gilbert,

but he did on many occasions finally admit that there were some things that he did talk to Mrs. Gilbert.

Clearly if her only idea was that night mitten, he would not have been discussing all his advertising with her and which I think he admitted at page 46 fairly early in the game that he had discussed it with her once or twice. But as the record progressed and the evidence came into being, it showed much more.

Now, why would they have had a meeting with this Mrs. Gamble. That's the lady whose deposition, the arthritic over in Jersey that we had to take her deposition. Mr. Stanton was there, Mr. and Mrs. Gilbert were there and for whatever it may be worth it was Mrs. Gamble's testimony that in her -- that in this discussion she got the impression that Mrs. Gilbert was the spokesman for the product. She was as she put it the star of the show and that the glove was as she said a necessity.

If she was giving a wrong idea, certainly Mr. Stanton was there to correct her so that no one would go away with any false impressions.

I might point out that if they had nothing to do with this thing, why were they part and parcel of the Rainbow Room and the Plaza presentations and why was Mr. Gilbert asked to make a talk on it. All of this indicates,

the talk by the way is Exhibit 96 of which your Honor has a recording. All of this with the idea -- rather I should say in spite of all this your Honor is asked to believe that she contributed nothing.

Now, what I call the second defense is that Stanton already had the idea for the manufacture and marketing of a therapeutic glove made of this Lycra Spandex and that has about as much weight as the first defense because he claims that the idea came from a deceased gentleman named Mr. Winkler of Blue Ridge. If that were true, your Honor, at the time of the March 30th meeting when the revelation was made to him, he would have said, oh, I got this some years back from Mr. Winkler, thanks very much. But, no, he went on to discussions as to payment, talked about 6 to 8 per cent and finally agreed on 8 per cent and then he went on to formal agreement conversations and his eternal fairness. None of which would have happened if in fact she had contributed nothing. He would have said that. He is a businessman. He wouldn't offer to pay twice for something he got once. In that regard I got it from some other source.

Now, your Honor will recall that Mr. Taub of Blue Ridge, who was a member of that so-called research and development committee and a salesman for Blue Ridge is,

eojb 14

he said he showed Mr. Stanton and other glove manufacturers their experimental Lycra Spandex which materials he said did not in fact attain any end use, that is at page 745, your Honor, and Mr. Taub never told anyone that the material had therapeutic qualities.

Similarly we had the deposition, I believe it was, of Mr. Kantrowitz who, too, was a member of the research and development committee. I always stumble on that because it struck me upon the description of the various people as to their qualifications to be on a research and development committee that it was something made of whole cloth, but nevertheless Mr. Kantrowitz in his deposition testified --

THE COURT: Will you remind me what company he was associated with?

MR. HANDELMAN: Blue Ridge. He made no mention of any therapeutic ideas emanating from his chief Mr. Winkler as claimed by Mr. Stanton. The only one who came to Mr. Stanton's support was this Diane Levine of Blue Ridge who not only was on the R&D committee, as she called it, but she also was the secretary who took down the minutes and she said, in support of Mr. Stanton, that Mr. Winkler gave Stanton the idea of a Lycra Spandex Supp-hose for the hands way back in '65 or '66. She claimed that

that matter of his giving that came up in these R&D meetings of which she was the secretary and she stated that she made six copies of the minutes of each of these meetings, but none of them have ever been presented.

As a matter of fact, we have a lot of the Blue Ridge files in evidence, your Honor. I think they are Defendant's Exhibits S, T, U, and V and they indicate that the proposed end use of all of this material was strictly for swimwear or bathing suits and I think that was material that was described as too soft and too sleazy as some other materials were.

Certainly there was nothing in those files and even on an examination of the clothes that would lead anyone to think there was any possibility that that soft material would do anything about depressing veins. I hate to talk about depressing veins because I think that is so remote from this whole thing and it is certainly contrary to the deposition of Miss Levine who at that time remembered no such conversation. I refer your Honor to pages 791 to 720 of her deposition.

Unless I indicate a deposition transcript, I mean a trial transcript, your Honor.

Now, an interesting thing is that your Honor is asked to believe that Stanton received this idea from Mr.

eojb 16

Winkler in '65 or '66, but he didn't carry through because he thought, in other words, he didn't do anything with it, because he thought that the material made by Blue Ridge was unsuitable and to use the word again too sleazy.

Now, Mr. Robbins of Webco, whose material is actually being used in the glove, he testified that they were selling that same material back in '64 or '65 and if the idea that was given to Mr. Stanton in '65, why would he have delayed in doing anything about it? Especially when you look, your Honor, to the feverish activities. I think they could fairly be considered feverish activities in his efforts to develop this glove after March 30, '68.

In other words, I say to your Honor there is nothing in this record to show any real effort or any effort of any kind by Mr. Stanton prior to March 30th. It is all conversation about somebody showed him something late in '67 or early in '68 and it is the day before Christmas, the day after this constant attempt to dragging this thing back, but if you look at the facts and you look at the documents here, everything indicates that the only activity and it certainly was an awful lot of activity, but it all came subsequent to March 30th. I think that's a very, very significant fact, your Honor.

If the idea was given to Stanton then, he not

eojb 17

only would not have delayed, but we see him after March 30th rushing out almost immediately to get an exclusive on that material. He didn't make any efforts before March 30th on that and aside from getting the material, which, as I say, Webco had been selling since '64 or '65, when does he get busy with an advertising man? We never had the pleasure of seeing Mr. Chanler. I had been looking forward to him. I couldn't find him myself, but nevertheless, we have the correspondence with Mr. Chanler, that is Exhibit 26, and that doesn't start until August '68. So with respect to this idea that he had in '65 and which someone, Mr. Cohen sort of nudged him about in late December of '67, he still did nothing until August of '68 when he gets busy with brother Chanler.

There are exhibits like Exhibits 22 to 24 and 2 to 111 which reflect the activities between Aris and Somark, which is certainly something that we would look for as an inditia of whether Aris was doing something about this glove.

The correspondence, the only correspondence there is in that connection starts in April of '68. Again after March of '68, after the time when Mrs. Gilbert at the Right Bank gave this man the idea.

We are asked to believe that really there was

activity on the part of Aris and Somark, but it was always verbal, nothing was written down, there are no records, no one has any memorandums, so for all intents and purposes I think it is imperative to conclude that if there was any activity between Aris and Somark with respect to this particular glove. Your Honor will remember that Somark, as your Honor brought out by his own question, were beholden to Aris, put it that way, for 50 per cent of their production both volume and dollarwise.

The earliest invoices reflecting shipments of any material to Somark, that is Exhibit 27, and that, if your Honor please, is in May of '68 which again is subsequent to March 30th, '68.

Now, another little inditia of when things became important is when did Aris, who were very experienced in these matters, when did they start thinking about trade mark registrations for the names Hands Beautiful and Iso Toner and that, as shown by Exhibit 28, was in July of '68. Again late enough to indicate when the idea arose. Exhibit 28 to be specific, your Honor, shows that the first use of that name was in July of '68.

Exhibit 29 with respect to Aris obtaining an exclusive on the Webco material --

THE COURT: What exhibit did you say?

eojb 19

MR. HANDELMAN: That's Exhibit 29, sir, and that's dated October 21, '68. That, I think, has a lot of significance because he is waiting until they have a fair idea that they can stop the curling of this material and learn how to, you remember there was some talk, your Honor, about putting some kind of glue on the edges and they finally got so they could hold it down and they used the cloth inside out and could get decent stitching in it and as soon as Mr. Stanton saw he had something he could manipulate, he got busy on the exclusive and that is October 21, '68.

Now, with respect to that, it was Mr. Robbins who testified that it was some 30 or 60 days before October 21st when for the first time he was approached with respect to an exclusive on that material and that is a long way from the conversation about late '67 or early '68 when Mr. Cohen --

THE COURT: October 21st of '68, right?

MR. HANDELMAN: Right.

THE COURT: Is a long way from December of '67?

MR. HANDELMAN: From Mr. Cohen in December of '67 or early, as he put it, early '68.

Mr. Robbins testified that he had his discussions with respect to that exclusive with Mr. Stanton and he said he had never seen or heard of Mr. Cohen.

eojb 20

So from all of that your Honor can fairly conclude that if Mr. Stanton was prompted by some motivation, it was a motivation that didn't occur in '65, but rather in March of '68.

THE COURT: For the purpose of listening to you better, I am going to take a short recess as usual. Let's try and decide what our schedule will be, though. You have been at it about 40 minutes. I would like to ask you to finish this part of your summation in another 20 minutes and then you will have 10 minutes to sum up after the defendants and I will give them an hour.

(Recess.)

THE COURT: All right, I think you had just concluded by telling me that as a result of all your references it was resonable to conclude that the idea that Mr. Stanton acted on was secured in 1968 and not in 1965.

MR. HANDELMAN: That is the course I was sort of in the middle of. I will try and speed it up as much as I can.

THE COURT: About another 20 minutes now.

MR. HANDELMAN: What I call the third defense is the Cohen defense and that I think is probably the most indicative of an attempt to mislead the court.

Now, here we have a claim that Mr. Cohen in fact

brought Mr. Stanton a sample of Webco material, which incidentally your Honor will recall he said he happened to be up at Webco and his eye fell on the material. He thought this is going to be great and it turns out from what Mr. Robbins of Webco said, the material had been around since '64 or '65 and Mr. Cohen maintained he had always been going up there through the years and knew them well.

In spite of the idea that having been given to him by Mr. Winkler in '65, this is I think a very significant thing, when he allegedly gets it from Mr. Cohen, it is brought to his attention by Mr. Cohen in late '67 or early '68, he doesn't like it. He turns it down and it is only after Mr. Cohen comes back the next day or two days later, it sounded like one day to me and I marveled at Mr. Cohen's ability to get this glove manufactured so quicklyin view of the other testimony of Mr. Kramos and everyone else how difficult, including Mr. Robbins, how difficult it was to handle this thing, like getting to the moon, but Cohen came back in a day and he had a glove and now Mr. Stanton looks at that and that's great and he is going to do that and he is going to pay Cohen and all that sort of thing.

Again it brings us back to the very significant

eojb 22

fact that if as recently as late '67 or early '68 he had been discussing this with brother Cohen and was on his way to bringing out this glove with the therapeutic qualities, certainly his memory was refreshed enough about what he learned from Mr. Winkler and he should on March 30th have been reasonably expected to say, no, that's an idea that I have had for a long time.

Instead of that he goes on, he doesn't mention that to his friends the Gilberts and he admits they were great friends at that time and he doesn't say anything. Not only does he say nothing at that happy dinner at the Right Bank on March 30th, but your Honor will recall a story he gave about he thought he signed a -- he admits to the meeting on the 30th, but he signed it lying on his back on Monday when he was getting his yoga lesson up in David Gilbert's office and so he had another two days over the weekend to refresh his recollection that he had had this idea from Mr. Winkler in '64 or '65 and thathe had it again from Mr. Cohen in late '67 or early '68.

Then, of course, appropos of what I mentioned about the glove miraculously being made in one day, but as the testimony shows at page 52 Mr. Stanton said that they checked with the manufacturers where Cohen allegedly had the glove made, but no one had any recollection or

eojb 23

record of its having been done.

I submit to your Honor in view of what both Mr. Robbins and Mr. Kramos said about the difficulty, especially Mr. Kramos telling how long it took him to master this rebellious cloth, that sounds a little odd.

Then, I don't like to throw any brick bats at Mr. Cohen, maybe I am an overly suspicious type, your Honor, but I do think that his testimony should be viewed in the light of that $12,000 check which he received on the very morning that he testified.

THE COURT: Supposing it was less than he hoped for?

MR. HANDELMAN: He said that was compensation to him for his consulting services during the year 1974 and here he was getting his payment in January of '75 on the very morning of the afternoon on which he testified.

THE COURT: I don't frankly know what to make of that. It seems to me very easy for the defendants to avoid that dilema for a week or two and one can argue there is a refreshing candor in plunking it down on the table.

MR. TRIEN: Either that or a demand on the part of the individual.

THE COURT: Yes.

MR. HANDELMAN: It might be candor and at the

risk of your thinking I am overly suspicious, strange things happen in litigation.

THE COURT: I am simply reacting.

MR. HANDELMAN: Your Honor, too, should remember all of this was pursuant to verbal agreement between these admittedly good friends. The only thing I can say for it, your Honor, is that Mr. Cohen is a sick man. If they had been such good friends I am at least glad to see that some money is going to a sick man and that's about all I can say for it and that's why I looked with some jaundiced eye at these back-up documents that I neither understand nor comprehend, but whether your Honor accepts my suspicions about Mr. Cohen or not, I think the factual set up as to Cohen's having his eye fall on the material and the quickness of moment certainly leaves a little something to the imagination.

One thing I will say for brother Cohen, he was very frank to say that he didn't have any discussions about any therapeutic parts of this thing or nothing. He just was the guy to get the material and, as I have already pointed out --

THE COURT: He commented that, as I recall he commented that there was a virtue aside from health aspects to a stretch material for a glove because you could

eojb 25

make one-size glove that might fit a lot of size hands.

MR. HANDELMAN: I think the one-size glove is not anything new. I think that has been done before. At least it is very prevalent now.

THE COURT: There is nothing in the record one way or another on that.

MR. HANDELMAN: Now, his story when he was on the stand, when we had to get him here, that he gave-- not only did he give the glove, but he left a swatch of the material with Mr. Stanton and then also for the first time something he had not revealed in his deposition testimony, which is completely devoid of it, he mentions is that leaving the material and that the material was this pink color.

Now, to put this pink color to rest, your Honor, this talk about happy Easter to you all and that waswhat made somebody think that they were working, remembering they were working on this pink stuff in early '68 because pink is associated with Easter and all that. That was really imaginative, but not, I think, very, and I trust your Honor might find the same view, not very convincing about anything and certainly it is one, if your Honor will pardon the expression, one hell of a way to remember an important event like working on a new sample if you

remember it by the color.

Now, Mr. Kramos shows no activity prior to March 30th. The exhibits reflect and that starts with Exhibit 25 activity on April 17, '68 which again I need not point out is 18 days after the meeting at the Right Bank and in that letter your Honor will recall Mr. Stanton is asking Mr. Kramos, "Where are you going to ship the sample of the pink stretch glove of which Mr. Hammond sent you the cutting?"

Mr. Kramos testified that he never worked with the Lycra Spandex before and that because of the problems of cutting and sewing, he had great difficulty and in Exhibit 22, which is a letter dated May 8, '68, he refers to a pamphlet which refers to a pamphlet with a letter and the letter said that the pamphlet contained some useful information on the Lycra stretch fabric which we sent you. You should read carefully as there might be very useful information contained therein which will help you in the manufacture.

In the letter of May 28th, which again is part of Exhibit 22, Stanton asks Kramos to make an angle support out of the new bone stretch material. Again I think your Honor lending a lot of credence to the fact that it was again one of Mrs. Gilbert's ideas. No one testified

eojb 27

to any of these other little ideas with the exception of Mrs. Gilbert and not only did no one else testify to having them, but no one else denied that they came from her.

In the letter of June 17th, which is again part of Exhibit 22, Stanton asked Kramos to make a sample of four and eight-button gloves from the Webco stretch nylon. Again showing all of this activity subsequent to March '68 and Mr. Kramos testified that in solving the sewing problems of this stretch material by using nylon thread and there was a letter on that and that was July 15,'68 and part of Exhibit 23 and there Stanton is requesting samples of this elastic thread. Kramos testified that he finally solved the thread problem by using nylon thread and in Exhibit 109 we have a letter dated August 6, '69, where Stanton asked Kramos: "Do you ever use nylon thread to sew gloves?" So we see the proximity of the question from Stanton --

THE COURT: You say August 6, '69?

MR. HANDELMAN: '69, sir.

THE COURT: Isn't that a year later than the other events?

MR. HANDELMAN: Yes, and that fits in with the production problem.

THE COURT: I thought you were trying to establish

that there were a bunch of events shortly after March '68.

MR. HANDELMAN: I have, but they stretch out and they go as we pointed out to actual production of this new glove and certainly no one can deny that it was a new glove because both by virtue of the success it experienced and the fact that no one else has it, but it stretches into '69. That's when the production started.

It takes time. It doesn't take from '64 or '65, your Honor.

THE COURT: Can I ask you to complete your presentation in five minutes.

MR. HANDELMAN: Yes, your Honor, I think I have very little more.

On the nylon thread it is just indicative of what goes on. He asks for sample of it and the prices of it and so forth and I won't bore your Honor any further with Kramos' testimony as to the difficulties that he elaborated on.

THE COURT: I am conscious of those.

MR. HANDELMAN: Right, right, I will see if I can eliminate some more.

Then we have I think another significant thing, Exhibit 108 and Exhibit 3 are again Kramos' records showing the receipt of material.

eojb 29

THE COURT: Exhibit 3?

MR. TRIEN: It must be 103.

THE COURT: 3 is the girdle.

MR. HANDELMAN: 111, 108 and 111.

THE COURT: Are what?

MR. HANDELMAN: Kramos' records showing the receipt of material and it shows that the earliest receipt of Webco material was on June 20, 1968.

All of that that amounts to merely establishing that there is a written record as to the activities of Kramos in working out these samples and the production. I think that concludes what I have to say to your Honor.

THE COURT: All right. Thank you.

MR. Stockell.

MR. HANDELMAN: There is one other thing. I have already mentioned about their recollection being based on the pink material.

THE COURT: Yes.

MR. HANDELMAN: And the only other thing that comes to my mind, your Honor, I would like to add is there was also in an attempt to duck the responsibilities of this situation there was an attempt to show that Mr. Stanton had a Lycra Spandex glove in effect in the one that he had that was a lace glove and again that is talking

about apples and oranges, certainly no one could claim that this lace glove was in any way related to the therapeutically alleged, so we call it, glove that we are talking about in this case and on top of that the proof again I suppose is in the eating. He sold about $5,000 worth a year and your Honor can take judicial notice of the dissimilarity so I won't beat that horse.

Thank you.

THE COURT: Thank you.

Mr. Stockell.

MR. STOCKELL: Your Honor, the plaintiff's basic contention here is that what was disclosed at the March 30th meeting was the night mitten and although --

THE COURT: You say that's the plaintiff's?

MR. STOCKELL: I am sorry, the defendant's. I am accustomed to representing plaintiffs, your Honor.

The defendant's basic position is that what was disclosed was the night mitten and that while some discussions of flattening the veins might have sparked some further ideas in connection with the Hands Beautiful glove, that that was not -- the Hands Beautiful glove was certainly not the disclosure made by the plaintiff. We believe the record sustains this and if the court agrees with us that it was the night mitten that was disclosed,

JULES BACKMAN, called as a witness, being first duly sworn, testified as follows: [24]

DIRECT EXAMINATION

BY MR. HANDELMAN:

* * * * * *

Q Doctor, you have had some discussions with me relevant to the issue in this case and I want to ask you, on the assumption of the following facts whether you can render an opinion that may be of aid to the Court. [28]

Assuming, Doctor, that prior to March 30, 1968 Aris Glove Company, that is, the defendant here, did not manufacture or market a stretch glove which was advertised as having amazing effect on the hand, thereby imparting beneficial cosmetic or therapeutic effects to

BEST COPY AVAILABLE

the wearer, and that over the period from early '68 to September, '69 Aris had developed a glove made from a fabric manufactured by a company known as Webco which contained Lycra Spandex and which had never before been utilized in gloves,along with a marketing and advertising campaign pursuant to which the glove was claimed to impart beneficial cosmetic and therapeutic effect to the wearer of the glove and that the use of the fabric and advertising campaign has been described by Aris' president as a, and I quote "Completely new concept," in the glove industry, that the services were rendered by Mrs. Gilbert in advising Aris in connection with the development and promotion of the glove which eventually was called Hands Beautiful and Iso Toner, and that during the period of experimentation with the fabric which was to be utilized in the glove, Mr. Stanton, that is, the president of Aris periodically discussed the new glove and the advertising and marketing campaign with Mrs. Gilbert and sought her comments about its design, keeping her informed about his progress with the product, and that during the development of the campaign Mrs. Gilbert advised Mr. Stanton at his request of her reaction to proposed advertising and packaging plans, and that Mrs. Gilbert gave continual advice to Mr. Stanton throughout the development and promotion of the

glove, advice which Mr. Stanton solicited and often used, which advice was given in clear reliance on Mr. Stanton's promise to compensate Mrs. Gilbert --

THE COURT: I don't think that needs to be a part of the hypothetical to Dr. Backman, the question of whether there was reliance or not.

The question of value of services depends on what they were worth, not on what they were relying.

MR. HANDELMAN: I am merely putting it in context, your Honor, to point out that the specific nature or amount of the compensation was not specified between the parties.

THE COURT: That's correct.

Q And that Mrs. Gilbert had experience in design work both at school and as a freelance worker in that field --

MR. SWIRE: Objection.

THE COURT: It is all a hypothetical question. Of course it is subject to your demonstration that any element of the hypothesis is not correct.

Q I will strike in that field. I will say a freelance worker, if that will please counsel more.

That during the effort to find the proper fabric to create the massaging effect samples were sent to

Mrs. Gilbert for the purpose of having her comment on the quality of the fabric, and that during --

MR. SWIRE: Objection. Excuse me, your Honor. Would you prefer that I object piecemeal or at the end?

THE COURT: What I would have preferred, but it is a little late now, is that Mr. Handelman had indicated to you and me that he would ask this question so that we could go over it in advance and see whether we agreed with the facts stated in the question.

Why don't you read the whole question, Mr. Handelman, and Mr. Swire you make notes as to what you think are incorrect and we may have to discuss it briefly to see whether it is justified or not.

Q That during the period when the proper fabric was being sought, Mrs. Gilbert advised Stanton that fabric samples which had been sent to her for her opinion were too thin and would not make a proper glove, because the fabric did not have enough body to it and did not create the massaging action in the hand, since they were lacking in firmness and strength; that before advertisements were prepared, Stanton discussed with Mrs. Gilbert specific material which was to go into them and the terminology to be used; that Stanton sent numerous glove samples to Mrs. Gilbert during the development stage,

asking her opinion about them; that among other things, Mrs. Gilbert criticized and made suggestions regarding the way the thumbs were cut and the length of the fingers, some of which suggestions were incorporated into the glove; that a number of initial glove samples that were made were sent to Mrs. Gilbert by Stanton and discussed with her; that the development of the glove and the advertising campaign was discussed with the girls at various dinners that they had together; that an insignificant problem in the early manufacturing stage was that the fabric curled and was difficult to sew, a problem which was discussed with Mrs. Gilbert, Stanton having asked her how to eliminate that problem; that with respect to

THE COURT: Mr. Handelman, is the question much longer?

MR. HANDELMAN: One more page.

THE COURT: I think -- does anybody have handy a copy of my decision so far in this case?

MR. TRIEN: Yes.

THE COURT: I remember this. That -- have you seen the entire text of the question before this, Mr. Swire?

MR. SWIRE: No, I have seen nothing.

THE COURT: I would suggest that we do one of

two things:

Either that -- both of which would have to be done in the robing room. Either that you undertake to go through this and point out where the findings to which you refer are contained --

MR. HANDELMAN: I am prepared on that, your Honor.

THE COURT: Let us do that and get it out of the way. You are going to be asked the same question in general of the other witnesses?

MR. HANDELMAN: Yes.

THE COURT: Then let us get this cleaned up.

(In the robing room)

THE COURT: Off the record.

(Discussion held off the record)

MR. SWIRE: As your Honor has observed I am hearing this for the first time. The notes I have taken so far are based on just listening to Mr. Handelman in court.

The first note I have was Mr. Handelman's statement referring to the development of the glove as being from September 1968 to October 1969. I understand -- excuse me, September 1969.

As I understand your Honor's decision you

specifically found that the particular fabric had been found in December 1967 --

MR. TRIEN: May I interrupt? He has it wrong, your Honor. The statement was made that it was developed over the period early 1968 to September, 1969.

MR. SWIRE: I heard it as September, 1968 to October, 1969.

MR. HANDELMAN: September.

MR. SWIRE: The question is whether I heard it incorrectly or not, I suppose the only one who can tell us that is the reporter.

MR. TRIEN: If there is any question we can amend the question. It should read from early 1968 to September, 1969.

THE COURT: There is a question so it should be amended.

Off the record.

(Discussion held off the record)

THE COURT: The reading of the question if it was misread will be corrected to indicate that the developmental period began early '68.

MR. SWIRE: The second principal point, the question refers to, I think I quote in substance here, that during the period of development while the proper fabric

was being sought, Mrs. Gilbert advised Mr. Stanton certain samples. That is simply directly contrary to the finding of the fabric that was used in the final glove had been found by Aris prior to March 30, 1968.

THE COURT: How is it phrased in the question?

MR. HANDELMAN: That during the period when the proper fabric was being sought, Mrs. Gilbert advised Stanton of the fact that the fabric samples that were sent to her were in her opinion too thin and would not make a proper glove because the fabric did not have enough body to it and did not create the massaging action on the hand since they were lacking in firmness and strength.

Pages 397 and 424.

THE COURT: It may appear in the transcript but we are now at a further stage.

Off the record.

(Discussion held off the record)

THE COURT: We cannot retry the case, clearly. I did find that the material in question was known to the defendant without Mrs. Gilbert's assistance, and any hypothetical question that you ask which was based on the implication that she contributed towards the determination of the fabric, it seems to me would be misguided and the answer would not mean anything.

MR. TRIEN: There is nothing necessarily inconsistent about our phrasing of what she did and the facts as your Honor found it.

THE COURT: What is the relevance of it in the developmental period?

MR. HANDELMAN: If your Honor recalls, in the developmental period they were trying to make up a glove, there were times when she said it was not firm enough and finally a time when she said that it was firm enough.

MR. TRIEN: In other words, that is consistent with the finding that Mr. Cohen had found the Lycra Spandex fabric made by Webco for Stanton.

As Webco testified, they made various grades of it.

MR. HANDELMAN: Of the same material.

THE COURT: I think what we better do is this: I am afraid that you are going to have to give Mr. Swire a copy of the proposed question and I am going to ask you, Mr. Swire, to bring to my attention only anything that you think of is major consequence. You are free of course to cross examine any witness and ask him to what extent his opinion would alter if such and such in the question were not correct and later we can argue whether those elements are or are not correct.

I do not want to waste today on that.

MR. SWIRE: I of course have a hypothetical for my witness which I will furnish to Mr. Handelman.

THE COURT: I would suggest that you furnish it to Mr. Handelman so he can comment on that.

(Pause)

THE COURT: Look at this copy, Mr. Swire.

(Pause)

THE COURT: If you do not raise any major points at the present time, that is without prejudice to your right to cross examine in full, if you point out to me at a future time any inaccuracy in the question.

However, if there are any major matters I think we should deal with them so that we do not proceed on fundamental mistaken assumptions.

I am not suggesting there are any such fundamental mistaken assumptions.

MR. SWIRE: On the second page, your Honor, the second, third and fourth paragraph, the second paragraph we just discussed and they are directly contrary to the finding that the exact fabric --

THE COURT: I don't know if it is directly contrary but it implies that Mrs. Gilbert contributed to that, as I found she did not.

MR. TRIEN: How about the point, your Honor, that there are various grades, as Mr. Robinson of Webco testified. There are invoices put in the record in which Mr. Rosinson testified that they were getting various weights of the fabric.

THE COURT: It is a question of Dr. Backman understanding that the Court has found that the defendants were the persons who had this fabric on hand independent of her. If you want to ask him to consider that Mr. Stanton did send her samples for the purpose of having her comment on the quality, I am willing to have him consider that, as long as he understands what my finding is.

MR. HANDELMAN: As to weights, your Honor. There were different weights.

MR. TRIEN: He can clarify that on his cross examination.

THE COURT: I would like that fact to be understood to begin with.

MR. HANDELMAN: How would you want me to put that, Mr. Swire?

THE COURT: When we go back in I will make that comment myself.

MR. SWIRE: The sixth paragraph, that among

other things Mrs. Gilbert criticised and made suggestions regarding the way the thumbs were cut and the length of the fingers, some of which suggestions were incorporated in the glove. Certainly neither of those suggestions was incorporated into the glove. I do not think there is any testimony that any of her suggestions were incorporated into the glove.

THE COURT: We will handle that on the basis of your asking the extent to which his opinion would be affected if that were not true. I simply do not have a chance to search the record on that. I do not remember making any findings on that point.

MR. HANDELMAN: The record that I referred to there is Mr. Stanton's own testimony.

MR. SWIRE: It does not support the proposition, Mr. Handelman.

THE COURT: I am not going to argue that at the moment. You can do that on cross examination.

MR. SWIRE: Towards the bottom of the page, that with respect to the curl problem Mrs. Gilbert suggested that the fabric be starched. I would end there because the suggestion was clearly never utilized.

THE COURT: Where do you find that Mr. Stanton utilized that?

MR. TRIEN: She had testified to that.

MR. HANDELMAN: There was testimony too about their sizing it. The man from Somark testified to that.

THE COURT: I am not going to allow a hypothetical to be asked on the basis of the plaintiff's own testimony which was not adopted as a finding by the Court. I did not mean to say it is not true, but I did not make any finding that it was true.

MR. HANDELMAN: That was a problem covered in the opinion, your Honor, the curling problem.

MR. TRIEN: Your Honor did not purport to make findings on each and every dispute. What we attempted to do here was to utilize your Honor's findings in those instances where there was any dispute between the parties. If your Honor made no specific finding about it, then we felt that we could take her testimony as a basis for an assumption. Mr. Swire can of course on his cross examination find out the extent to which this assumption was --

MR. SWIRE: The further problem is the fact that they never starched the glove. The final glove is not starched. There was experimentation with starching and they abandoned it. It would be untrue to the facts and justice to say that.

MR. HANDELMAN: There is no testimony it was abandoned.

MR. TRIEN: That's right. The only testimony in the record with regard to that is her testimony.

THE COURT: I will allow you to ask the question, and I will allow them to cross examine as to what his opinion would be if it was not true, and I will allow you to put Stanton on the stand to say that it is not true.

MR. SWIRE: The top of the next page, I think this is important, in referring to it -- these are Mr. Gilbert's advertising ideas, that some of those ideas and those writings emanated from Mrs. Gilbert. For one, without reviewing the record, to know what particular ideas and it just seems -- it is totally inappropriate to suggest that.

THE COURT: I am going to say to the extent that any such vague ideas are contained within the question, they will make the answer less meaningful to me. Let's get down to brass tacks. A man of Backman's caliber is not going to pay the damndest attention to the statement that some of the ideas were from Mrs. Gilbert. He is going to want to know what they were and what they were not.

MR. SWIRE: The middle of the page, the paragraph which has something stricken out, that extensive advertising and promotional campaigns were undertaken with hundreds of thousands of brochures containing the claims as to cosmetic and therapeutic effects, I don't know what that is in there for, since the finding is that she cannot recover as to claims for cosmetic and therapeutic effect.

MR. HANDELMAN: It is in there because it is a fact that there was, if your Honor recalls, they had a batch, they were asked to modify it, and in addition they made a mistake, if you recall, and they printed up the identical stuff and again the administration said, well, go ahead and use them up. So all of those claims which were eventually eliminated were utilized in the printed matters, the first two batches of printed matter which composed really the great amount that launched this thing.

MR. SWIRE: That is not responsive to my objection.

THE COURT: I am looking at my memorandum here which says nor can Mrs. Gilbert recover for the advertising claims --

MR. TRIEM: But your Honor then states -- I

am awfully sorry, your Honor.

THE COURT: -- that the gloves would among other wonders, massage hands, compress veins and increase circulation, because she herself admitted that she had disclosed these claims to Stanton before the March 30, 1968 dinner meeting and without demand or expectation of compensation. What is it you wish to bring to my attention?

MR. TRIEN: Pages 13 and 14 of your Honor's decision. You say, on the other hand defendant is liable to Mrs. Gilbert for her continual advice to Stanton throughout the development and promotion of the glove, advice which Stanton often solicited and used.

THE COURT: It is clear by implication that that refers to other advice, etcetera, but I have not studied my own memorandum recently, but it doesn't mean to say that she could recover on one basis and not on another, but rather that she could recover on one subject and not on other subjects. Anything else, Mr. Swire?

MR. SWIRE: No, your Honor.

THE COURT: I will allow the reference to advertising and promotional campaign without the reference to the fact that the glove would create various

beneficial cosmetic and therapeutic effects. Made as to the virtues of the glove, say. Finally, Mr. Handelman, I note that you had perfectly understandably set this up with regard to the specification of the gross sales as they were. But I have already ruled that you are not allowed to specify what they were. In reading the question, you will have to end with a reference to the first year's sales, that they were approximately a million dollars, and going on, based on the assumption, do you have an opinion. And after the opinion is rendered, you will say if the sales were X dollars, what would your opinion be.

* * * * *

CROSS EXAMINATION

BY MR. SWIRE: [59]

Q Dr. Backman, I am interested in pursuing the last question that the Court put to you. I take it you are assuming that there was a substantial contribution from Mrs. Gilbert to the defendant in this matter, and you have mentioned to us one item, that being the suggestion of the name Hands Beautiful. Are there any other items that you are assuming she contributed to the success of this product?

A I am assuming that, I based my answer on the list of items outlined in the hypothetical question, and that included all sorts of things, from the thickness of the fabric, as I recall, to how one prepares it so it can be sewed, to a whole series of other things that seem to deal with how you made a viable, salable product out of what was an idea.

Q Let's get to, then, the thickness of fabric or how it was sewn. If in fact the manufacturing process, the taking of the fabric and sewing it in a plant into a glove, was accomplished entirely by the defendant and its independent manufacturing consultants, would that

affect the type or amount of compensation you would think Mrs. Gilbert was entitled to?

A I would think that if it were the only change, it wouldn't affect it very much; if all of the contributions to whatever the production problems were were wiped out, that would affect it.

Q Are there any particular contributions in the production process that you are assuming she made?

A I merely took that list -- I do not have it in front of me --

THE COURT: Why don't you take a look at it and mention to us those that you consider to be important in your opinion, in forming and reaching your conclusion (handing).

Q I think if you will go to page 2, Dr. Backman, that we get into the more specific items. The second paragraph there concerns -- the second and third paragraph concerns the fabric being too thin, not having enough body to it and creating massaging action to the hand. Are you assuming that Mrs. Gilbert's suggestions in these respects were adopted, in giving your answer?

A I am just assuming the language of the hypothetical, which implies they were adopted. I do not know. I made no special study of it.

THE COURT: Mr. Swire, I am going on the assumption myself that any witness, including Dr. Backman, must accept the hypothetical put before him, and the question is not whether he has accepted them, but how much weight he is attributing to it in reaching his conclusion.

Q How important a factor do you consider the suggestions as to the thinness of the fabric and the body of the fabric?

A If I may answer it in relative terms, I would think that was more important than the setting up the way the thumbs were cut than the length of the fingers, because this would go to what the glove allegedly could do.

Q If in fact Aris had the exact fabric that it used in the glove, the successful finished product, without Mrs. Gilbert's idea at all, I take it then that your assessment of the value of her idea would be decreased.

A It would be somewhat less, yes, sir.

Q The next item I believe, referring to specific ideas, was that the thumbs were cut and there were suggestions as to the length of the fingers. You have said that that is less important than the thickness of the fabric, is that correct?

A I said that on the assumption that the alleged massaging action was influenced by the thickness of the fabric. If to any extent it was affected by the way the glove was constructed, then of course the difference becomes less. But I just don't know, I am not a technician in that area.

Q To pin it down, though, if in fact even any suggestions as to the cutting of the thumbs and the length of the fingers were not adopted, that would decrease the value of the idea?

A It would be a factor, yes, sir.

Q Moving to the curling of the product, which was one of the items you assumed, how important a factor was the suggestion by the plaintiff as to curing the curling problem?

A I have no scale, I wish I could answer, but I have no scale by which I could say that this contributed X percent and the other thing Y and the other thing Z percent. I have to take the whole picture.

THE COURT: Can you put them in order of importance? Do you consider the curling problem to be more important than the other factors we have been talking about, or less?

THE WITNESS: I have one problem with the

cut in length of the fingers, your Honor. I do not know whether that influenced the massaging action. If it did, I would give that more importance than I would the fact that they found a way to sew it. If it does not, I would give it less importance, but again that is within the limits of my knowledge.

Q What is the reason you are putting so much strength on the effect on the massaging action?

A Because as I read some of the exhibits, I do not recall the numbers, that dealt with the advertising, this seemed to be one of the important selling points of the glove.

Q That the glove would have a massaging action on the hand?

A That's right.

Q Are you assuming that the suggestion as to the massaging action emanated from the plaintiff?

A I am just assuming the hypothetical, where it seems to imply that she contributed significantly to the construction of the gloves which would perform that function.

* * * * *

GORDON ZERN, called as a witness, being first duly sworn, testified as follows: [77]

DIRECT EXAMINATION

BY MR. HANDELMAN:

Q Mr. Zern, would you state what your background is in your profession, your training.

A I am presently senior vice president of Daniel and Charles Associates, an advertising and marketing agency. I am principally concerned with marketing. Prior to that I have been with them for eleven years. From 1950 to 1964 I worked in a variety of jobs for Fuller and Smith and Ross, an advertising agency, also involved with marketing of a wide variety of products.

* * * * *

CROSS EXAMINATION [86]

BY MR. SWIRE.

* * * * *

Q You testified that this 5 to 10 percent figure [88]
which in your opinion would be equitable here would be based on a substantial marketing contribution, is that correct?

A Yes, that's correct. That is what I understood.

Q What are the items of substantial marketing contribution that you are aware of here?

A Based on the question as I heard it, there is the development of a product from what I think of as an amorphous batch of bits and pieces into a coherent marketing entity. Development consists of taking a product or a marketing service or idea and making it into a marketable item, which is an entire proposition. I am sorry if I am fumbling, but marketing is an entirety.

* * * * *

Q Have you read the opinion of the Court in [105]
this case?

A No.

* * * * *

LARI STANTON, called as a witness, having been previously sworn, testified further as follows: [133]

DIRECT EXAMINATION

BY MR. SWIRE:

Q Mr. Stanton, in connection with the development of the Lycra Spandex glove by Aris, did Aris employ an independent or any advertising agency or marketing consultant?

A Yes.

THE COURT: At what period of time, Mr. Swire?

Q Up to the point of the introduction of the product in the fall of 1969.

A Yes.

MR. HANDELMAN: What period of time? I do not think that answers your Honor's question.

MR. SWIRE: It is all right in the record.

THE COURT: From the beginning effort I understand to 1969, I understand that they did. I do not remember the record that well, Mr. Swire, but I assume it is in 1968 or 1969.

MR. SWIRE: That's correct.

Q Was that the Harvey Chandler group?

A That is correct.

Q Are the documents in Plaintiff's Exhibit 26 already in evidence as correspondence with Mr. Chanler, do they give you an independent indication of the type of work he was doing?

THE COURT: Has that been modified?

MR. SWIRE: No, it is already in evidence, your Honor, as Plaintiff's Exhibit 26.

A Yes, it is.

Q What was your arrangement with Mr. Chandler?

A His fee was $435 a month.

Q What did that include?

A This included the development of labeling, packaging, advertising copy, merchandising, development of TV scripts, radio scripts, development of point of sale displays, sales girls selling cards, sales girls selling tips, statement enclosures, contact with media such as NBC, in connection with possible TV contact with outside consultants.

Q Such as?

A Andrew Graham and Dr. Lubowe.

Q Graham being the attorney who testified at trial?

A Dr. Lubowe did some testing work.

* * * * *

Q In connection with Mr. Chanler's bills, [137]
were there other individuals working with him?

A Yes.

Q Included in the same monthly rate?

A That's correct.

Q How many others were there, to your knowledge?

A There were two and perhaps three, but two I definitely know of.

Q Mr. Howard Chanler?

A Yes, that was his cousin.

Q And Miss Gilda Block?

A That's right. She was the copy writer.

Q What was Mr. Chanler's professional background, do you know?

A His professional background was that he was a marketing man and at that time I believe was the marketing manager for Swingline Staples.

Q The work he was doing for you then was on a freelance basis?

A That's correct.

Q If you look at Exhibit A, the top page, does that accurately reflect the dates during which Mr.

Chanler worked for you?

A Yes.

Q What are those dates?

A October 3, 1968 through I believe November 15, 1969.

Q And the Hands Beautiful glove was introduced when?

A I believe it was in August or September 1969.

Q And Mr. Chanler's total compensation during that period was $5,870?

A That's correct.

Q That included the services of the people working with him?

A That's correct.

Q Mr. Stanton, there has been some testimony this morning about Mrs. Gilbert's suggestion that the fabric used in the glove be starched, a suggestion which you supposedly utilized.

MR. HANDELMAN: Is this a rebuttal, your Honor?

THE COURT: No, it is not rebuttal. Don't you remember in the discussion in the robing room I allowed this material to come in in the hypothetical question?

MR. HANDELMAN: I am sorry, I did not remember that your Honor had made that ruling. I thought it was all in the record.

THE COURT: That that statement could be challenged by other witnesses.

Q Has the commercially sold product ever been starched to eliminate the curling?

A The commercial product never has been starched.

Q So that the curling characteristic still exists in the gloves?

A The curling characteristics exist and we want them to remain in the glove.

Q Were any suggestions by Mrs. Gilbert as to the way the thumbs were cut or the length of the fingers ever incorporated into the glove?

A. No.

MR. HANDELMAN: Your Honor, I submit the record on all this is complete. I do not think that the defendant is entitled to single out any parts of the record and repeat them at this time.

THE COURT: You will have to show me where they are in the record.

MR. HANDELMAN: I can do that in the record, your Honor.

THE COURT: Go ahead. Do you have the record with you? Some of the references I see in your hypothetical question are with respect to my memorandum, I don't construe the same way you do, my memorandum.

MR. HANDELMAN: The subject was gone into in the trial by both sides.

THE COURT: My point is if it was and we have a record on it, I agree with you. But you put it into the hypothetical question. Then I have ruled that the defendant has a right to ask the witness about the facts which are assumed in the hypothetical question.

MR. HANDELMAN: Then I assume I will be able to put on whatever proof I have of contradiction.

THE COURT: Sure. But if it is settled in the record, I don't want to waste any time on it. Why don't you show us what you are referring to?

MR. TRIEN: There was reference, your Honor, at page 430.

(Pause)

THE COURT: You are talking about Mrs. Gilbert's testimony?

MR. HANDELMAN: Yes.

THE COURT: Let me read it.

(Pause)

THE COURT: I quite disagree with you that the testimony referred to establishes the proposition which the hypothetical question indicates. The hypothetical question indicates as follows, or reads: That with respect to the curl problem Mrs. Gilbert suggested that the fabric be starched, a suggestion which Stanton utilized; referring to page 430 of the record. At page 429 and 430 of the record the testimony is as follows, by Mrs. Gilbert: "I said to Lari, 'Won't it be possible to size the fabric or starch the fabric to make it easier for cutting purposes?' He said, 'Well, That is a thought.' And he did that, had that done."

"THE COURT: How do you know?

"THE WITNESS: Because the subsequent gloves were easier to cut from then on."

MR. HANDELMAN: Yes, and at the time of the trial --

THE COURT: Then it goes on. You are right. It then goes on to say that Mr. Stanton told Mrs. Gilbert that he had sized, he had starched, had the fabric starched.

MR. HANDELMAN: And there was no rebuttal to that or denial by Mr. Stanton during the trial. And I do not think he should be permitted to do it now.

THE COURT: Why not? It is the same case, the same trial.

MR. HANDELMAN: I know, but are we re-opening the trial?

THE COURT: I think we may have to re-open here and there with regard to items that affect the damages. If you are claiming as one of the items she is entitled to damages because of the fact that she made this contribution, I may consider it fair and equitable to consider whether or not the defendant should be given an opportunity to say something about it. What did you want to say, Mr. Swire? Of course that would apply to both sides, obviously.

MR. SWIRE: Our point, your Honor, is that the Court made no finding on that.

THE COURT: I did not.

MR. HANDELMAN: There are a lot of things that your Honor made no findings on.

THE COURT: When I did not make the finding, Mr. Handelman, of the contributions which were made, it seems reasonable to me that you are going to claim that you did make such a contribution, that I should have a full story on the subject. We are not playing games here.

MR. HANDELMAN: Quite so. And I would further --

THE COURT: If you had been surprised by this point then you may have a further opportunity to put more evidence in on this if there is any more.

MR. HANDELMAN: To make my position clear, your Honor, when you make a finding that Mrs. Gilbert did such and such, for example, she gave continuing advice in the promotion and development, certainly as to those things that are part of promotion and development, which are in the record, and let's assume in the record solely through Mrs. Gilbert, but if they were not denied during the trial, I think that they would be the elements which would go into your Honor's finding. I assumed that.

THE COURT: I am not disagreeing with that view of the matter. It is impossible for me without having written a voluminous opinion that I do not think was required of me, to try to specify every item on which she made a contribution. The fact that I did not do so and that you now wish to emphasize certain points does not seem to me, nor the fact that the trial with regard to liability has been concluded, does not seem to me to preclude some reasonable clarification of

the issues which you are presenting for further determination.

MR. HANDELMAN: That would be true, your Honor, as to clarification. My point is very simple: that after a hypothetical comes into being, which is based, as I understand, upon your Honor's finding as supported by the evidence, keeping in mind that your Honor's finding is usually a conclusory part and that elements that go into that, that I am entitled to have the testimony that supports it, whether it is his or hers or anyone's.

THE COURT: I am not ruling the testimony out.

MR. HANDELMAN: I know. But what is being done here, your Honor, it is being made possible if the hypothetical comes into existence for him to come back on rebuttal and to deny what he failed to do. Is deny on the trial what he had ample opportunity, we can assume I think in all logic and fairness that those were true and that he could not deny it.

THE COURT: That may be a very good argument with regard to the question of whether I should believe what Mr. Stanton is saying, but I do not believe it prevents him from telling under oath what he wishes to, or what his counsel wishes to bring out, and I think it

is in the interest of justice to bring out as much information as possible here. You may argue later and I may be persuaded by the argument that Mr. Stanton did not say this the first time around, but that does not mean that I can't listen to it now.

MR. SWIRE: First of all, your Honor, as you know, I have just seen this finding and these page numbers today. I do not know that there is not in the record a denial on that point, and I am not prepared to say one way or another that there is or is not. The second point is that I do not think there was an issue at the trial. What we were trying on liability as it turns out is slightly different than what we are trying today.

THE COURT: I do not think you can make that statement on the record , because this case goes farther. I do not think it is possible for the both sides to bring before me precise evidence on the hypothetical --

MR. SWIRE: I asked Mr. Trien previously whether he intended to put Mrs. Gilbert on for emphasis of these points, and he said no.

THE COURT: Let's go on. I want to conclude.

Q What is the trademark currently being used for the product at issue?

A The present trademark is the Iso Toner glove.

Q What has happened to the trademark Hands Beautiful?

A We have phased out of that, actually and reducing, or at least reducing the name Hands Beautiful to an insignificant size in the body of the copy.

THE COURT: You mean in visibility?

THE WITNESS: In visibility and when it comes to the driving glove, which is the main Iso Toner glove, there is no mention whatsoever of the name Hands Beautiful.

* * * * *

Q What is Defendant's Exhibit B, Mr. Stanton?

A Defendant's Exhibit B is what we call the Iso Toner glove. It is the Iso Toner material with leather strips on the palm to secure a firm grip on the [146

lkm Stanton-direct 147

wheel while you are driving.

Q Is that considered a fashion glove?

A No, it is considered a driving glove. It is sold as a driving glove.

Q What percentage of the sales of the Iso Toner or Hands Beautiful gloves are represented by that particular style?

A This particular style represents approximately 70 percent of the Iso Toner glove sales.

* * * * *

STANTON - Cross

CROSS EXAMINATION [148]

BY MR. HANDELMAN:

* * * * *

Q What services were you to get from Mr. [156] Chanler for which he was to bill you $435 per month?

A Mr. Chandler was a professional --

Q I didn't ask you what he was. I am asking you what services did you understand or were you told that you were going to get for your $435 per month?

A Mr. Chanler would prepare the advertising, the promotion, the contact with the media, the marketing study as to what concept we should take, what thrust we should make, what we should emphasize in our marketing, the pricing; he would do marketing work for us.

Q Had you ever employed anyone in that capacity before?

A We have had previous freelance people, yes.

Q And did you ever employ any such people at the rate of $435 per month for a team of four?

THE COURT: It was three as I understand it.

MR. HANDELMAN: Three plus Mr. Chanler.

THE COURT: I thought Mr. Chanler, his brother and a copy writer. Was there anybody else?

THE WITNESS: Two that I knew of, and I think there might have been frome time to time a person who set copy or set type actually, or something.

Q So it was at least four?

A No, at least three.

THE COURT: At least three and maybe four.

THE WITNESS: Correct.

Q Do you understand my question? Had you ever previously retained anyone for this sort of thing at the rate of $435 per month for three or four people?

A No.

THE COURT: May I ask this: How was the determination of the figure $435 reached?

THE WITNESS: I think this is what he said he required, it probably was not the basis of maybe --

THE COURT: Don't tell me what it probably was. Tell me what you remember.

THE WITNESS: I do not remember, other than him saying that is what I need or want, and I said fine.

Q Now, I know in the month of November, 1969 you paid for the services, for marketing services rendered November 1 to November 15, $215.00. Was that for half a month?

A I do not know specifically.

Q I will show it to you. I show you this part of this Exhibit A --

THE COURT: You say for November 1969? It probably would be, because according to the statements and testimony previously the relationship ended on November 15, 1969.

Q I show you Exhibit A for identification and call your attention to the page marked November 15, 1969.

A That is correct.

Q Does that refresh your recollection that it was for half a month?

A Seeing it now, yes.

Q Was that the termination of your relationship with Mr. Chanler?

A Yes.

Q What were the circumstances of that termination?

A I think generally we felt that we were taking the wrong tack on using the name Hands Beautiful, and the general copy we just felt was not drawing in the people to buy the product, so we wanted to change the thrust of the advertising, so we went and found another freelance promotion and advertising man. His name was Warren Verrow.

Q How long did he serve?

A I do not recollect.

Q Is he still with you?

A No.

Q You have no idea whether it was one month or one year?

A It certainly was more than one month. I think it might have been four, five, six, seven months, but I am not sure.

Q How much did you pay him?

A I think it was approximately a little over $500 a month.

* * * * *

Q This Julia Forricelli, how did you meet her? [163]

A I think I put an ad in the Women's Voice or in the New York Times asking for advertising copy writer.

Q What were the creative services for which you paid her $150 on October 13, 1971?

A She did the advertising copy for the Iso Toner chin strap and another Iso Toner product.

Q What did she do for the $200 listed in this statement of November 12, 1971?

A Actually there were two products in which she rendered two separate bills. One was for the chin strap and I believe the other was either for an eye mask or a nail glove, I do not recall specifically.

Q The one that says Iso Toner Eyes Beautiful mask?

A Yes, that was the eye mask.

Q And she wrote copy with respect to that?

A She did the advertising copy and the creativeness, yes.

* * * * *

Q This sizing of the material, you remember your testimony about the curling of the material? [165]

A That's right.

Q Did you try sizing it?

A In my pretrial deposition I did indicate and I confirm today that we made two or three trials on

sizing the gloves.

Q Whose idea was that?

A That idea was Anice Gilbert's. And in my pretrial examination I indicated that we were not usin sizing in the gloves, that we found it impracticable and the glove lost a lot of its intrinsic quality when we would size the glove. I had indicated that in my pretrial examination.

Q What method did you substitute for making it more sewable when you had the curling problem?

A We used the substitute of a woman's dexterity in her hands. In other words, we trained our workers to work with this material without any sizing agent or without any starch.

THE COURT: Is it today made without any sizing or starch?

THE WITNESS: And today it is made without any sizing agent or no starch. It is made right from the natural state as we receive it from the mill.

* * * * *

DONALD SHEERIN, called as a witness, being first duly sworn, testified as follows: [169]

DIRECT EXAMINATION

BY MR. SWIRE:

Q By whom are you employed, Mr. Sheerin?

A I have trouble hearing, Mr. Swire.

Q I am sorry. By whom are you employed?

A Thompson-Koch.

Q Is that an advertising agency?

A Yes, it is.

Q How long have you been with Thompson-Koch?

A Three and a half years.

Q What is your position there?

A Creative director.

Q What are your duties as creative director?

A I am totally responsible for the production of advertising materials, in all its component parts.

Q Do you do any hiring?

A Yes, and firing.

* * * * *

Q Have you ever done any freelance advertising work? (171)

A Yes, I have.

Q Would you describe the type of work you did in a little more detail and tell us when it was?

A In my early years, from 1960 to 1964 when I was at Zlowe I was mainly copy on a retail basis, mainly on retailers, used car dealers, if you will, funeral home, insurance companies and that. That was through 1964. Then at Ted Bates, 1966 I did the television commercials, freelance for toy companies, I did new business presentations for advertising agencies.

Q Let's go back to the toy company. You were not working for Ted Bates, this was a separate assignment?

A While I was working for Ted Bates I did

moonlighting for a toy company, Remco, directly. This would be about 1967, and I wrote a couple of commercials.

Q How were you compensated?

A $200 a commercial.

Q Was there any other work in that period of this type?

A Yes. For an advertising agency called Crestwood. I did a toy commercial for them. They hired me to do that. And that was about $250. At that time for Crestwood, they had the New York distributorship of Fedders Aid Conditioners, and they asked me to create a theme selling line and a commercial, and I got $330 for that, and the line was "The Strong Silent Type." Pretty nifty line for the money.

Q Did they use that line in the commercial?

A Yes. In all of these deals, none of this was speculative. In other words, the price was agreed upon in advance, whether they liked it or not. We could take it on afterward. Let me go on a little bit. In 1969 at the new business presentation for Rudel Associates, Clifton, New Jersey, they are an advertising agency. The presentation was for Brioschi, and I was paid a thousand dollars as a fee.

Q What is a new business presentation?

A Well, that is really where you put together everything that the advertising agency will present to a potential client in order to get his business. In this case I helped them organize their profile of their agency, what they represented or believed they represented. I did a speculative for their presentation on Brioschi, which consisted of actually concept: of selling Brioschi as against Alk Seltzer.

THE COURT: What is Brioschi?

THE WITNESS: An antacid. They did not get the business. They did this year.

THE COURT: Let's get moving along. It is very late.

Q Any other freelance work?

A Yes. New business presentation for Marsteller in 1969-1970, for Aero Wax. That was a $2,000 fee.

Q What did you do for that?

A Just television commercials.

Q The new business presentation, as I understand it, the agency was making a presentation to the company to get the account?

A Yes.

Q And you did a portion of that presentation?

A Yes.

Q Did you ever work on an hourly basis?

A Yes, in my early days. 1960 to 1964, 1965, ten dollars an hour.

Q Were you familiar with the hourly rates for freelance rates in 1968 and 1969?

A Yes.

Q How did you achieve that familiarity?

A Well, you know it because in negotiating your own freelance you have to know what the going rate is. What are your friends charging, art directors, copy write, how do you sensibly peg a job?

THE COURT: You know what lawyers know today what lawyers generally charge per hour.

THE WITNESS: I would guess so, within our trade, we know what we charge.

Q What was the standard hourly rate for freelance work in 1968, 1969?

A Ten to twenty dollars an hour.

Q Have you had any occasion to employ freelance advertising personnel yourself?

A Yes, this past three years.

Q For Thompson-Koch?

A Yes.

Q What type of personnel do you retain?

A Copy writers, art directors, art services, the teams --

Q What are they paid?

A Well, the basic rate today is $25 an hour for an art director, or if he will work on your premises the daily rate is $150 a day.

* * * * *

BY MR. SWIRE: [180]

Q Mr. Sheerin, would you please assume the following facts, in 1968 Mrs. Gilbert, a housewife with no prior experience in advertising or promotion work, met with her personal friend of many years, Mr. Stanton, who was the president of the Aris Glove Company. She told him she had a business idea for his company for

which she would like compensation. He agreed, prior to hearing her idea to pay her a reasonable amount for her idea if it were actually hers, was novel to him and if his company actually used it. She then disclosed her idea to him. It was to manufacture fashion gloves from a Lycra Spandex material of the kind used in women's curlers. She further suggested that the fabric would benefit and could be advertised to benefit the hands of the wearer cosmetically and therapeutically by creating a massaging action on the hand, depressing and flattening the veins, increasing blood circulation and keeping the skin smooth, white and flat. She also suggested that the fabric could be used for other products such as body suits, stockings, facial masks and socks, and that such products would have similar beneficial effects. She had no documentation to support these claimed benefits nor did she have medical or scientific training. In fact, the glove company already had in its possession a Lycra Spandex fabric which it was in the process of developing for glove use, and the company was already aware of the possibilities of promoting a glove made of such fabric as a sort of Supp-Hose for the hands which would relieve fatigue, give a massaging effect and help circulation. In

addition, the comapny was aware of prior glove advertising which claimed cosmetic benefits, such as keeping hands smooth, white and useful. Aris did proceed to develop and market fashion gloves made of Lycra Spandex, you have heard, have heard, have you not, the testimony of Mr. Stanton this afternoon as to the services of Mr. Chanler and his team.

A Yes.

THE COURT: Will you assume, please, that Mr. Chanler and his team did perform the services which Mr. Stanton said they did.

THE WITNESS: Yes, sir.

Q And you have previously reviewed Exhibit 26, which is the correspondence with Mr. Chandler, is that correct?

A Yes, I have.

Q As packaging, labeling and advertising materials were prepared, they were often shown to Mrs. Gilbert for her comments and reactions. She also attended parties given to introduce the product to the trade and press, and at one party circulated among the guests to stir up enthusiasm for the product. She suggested numerous possible names for the gloves. Ultimately the product was successfully launched. The

period of time involved was from April, 1968 to September, 1969. Assuming Mrs. Gilbert is to be compensated for the reasonable value of these services and not for her suggested business ideas, do you have an opinion as to the basis on which she should be compensated?

A Yes, I do.

Q What is that opinion?

A I believe it should be on an hourly rate of ten dollars an hour.

Q On what do you base that opinion?

A Okay. I base that first on the going hourly rate of such services then available, and they were ten dollars to twenty dollars an hour.

THE COURT: Why do you pick the low end, if they were ten to twenty dollars?

THE WITNESS: I will get to that in a second. I also base that on the monthly service charge of Chandler Associates, $435 a month, whatever, and it seems to me that for the scope of that business, work that they had to do, they had to give that twenty hours a month, minimal, possibly forty hours a month. So again you can break out to the ten to twenty dollar an hour figure. Beyond that, these people who charge ten to twenty dollars an hour are working professionals.

They know what they are going and their experience is their value. Their judgment is not an opinion, it is based on their experience. So their full worth in that range of ten to twenty dollars an hour. For an amateur's experience, you can give them ten dollars.

Q Do you have any opinion as to a comparison of the type of work done by the professional as opposed to Mrs. Gilbert?

A That question I don't understand.

Q Was there any difference as you understand it between the type of function performed by the professional, Mr. Chandler, as opposed to that performed by Mrs. Gilbert.

A No difference at all that I can see.

Q Are you assuming that Mrs. Gilbert was creating copy?

A Let's say she may have been asked copy concept. Copy concepts are created by copy professionals and executed by copy professionals. So the copy concepts are just part of a copy writing job.

Q If in fact Mrs. Gilbert were only reviewing copy that Mr. Chandler had done, does that affect the value of the services she is supposed to get?

A Not really. I mean, there is a difference

between let's say one of our witnesses of this morning, if Mr. Zern was reviewing that copy, Mr. Zern's experience in judgment, he is worth quite a bit of money --

THE COURT: We are not asking about Mr. Zern.

Q I am trying to focus on a smaller point.

THE COURT: If Mrs. Gilbert instead of suggesting copy concept reviewed proposed material submitted to her, do you think the rate at which she would be paid would vary at all?

THE WITNESS: Wait.

THE COURT: If you had said that Mrs. Gilbert had suggested copy concept, if instead of doing that, she merely reviewed material submitted to her by Aris, would you feel that the rate of pay should be the same as for suggesting copy concepts or different?

THE WITNESS: The ten dollar an hour would then be generous because of the critic's role.

THE COURT: You would not bring that up on the twenty dollar hourly rate?

THE WITNESS: No, I would stay with ten.

THE COURT: But it would be generous?

Q What is the basis of your opinion that an hourly rate is appropriate, as opposed to some other

form of compensation.

A In lieu of a project fee, if you will, for example, Chanler had a project fee. That was the agreed upon amount. An hourly basis is the usual given way to do business. That is why I work with the hourly basis as an assumption. And then you get your project fees, which are negotiable.

Ex 26

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

244a

PI Ex 26

August 16, 1968

Mr. Larry Stanton
ARIS GLOVE COMPANY
10 East 38th Street
New York, New York

Dear Larry:

Just want to confirm that we will be meeting 5 pm next Monday at your office. At that time, I will show you representative assignments that have been produced by the creative team I represent.

Our strength, coincidentally, has been in the cosmetic and fashion areas, and include print and TV. Once we have the opportunity to study your item as a group and develop the creative approach, we would then be able to advise you on the feasibility of the most productive and profitable media.

It would also depend upon your distribution in specific markets. Also, depending on distribution, an umbrella of national print advertising might be appropriate.

Looking forward to meeting with you.

Sincerely,

Harvey Chanler

/ml

Rejs C 13 Pad
8/26/71

BEST COPY AVAILABLE

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

245a

ITEMS FOR HANDS BEAUTIFUL PROMOTION KIT:

1) Presentation folder
2) 2 suggested layout sheets
3) 1 suggested layout sheet
4) Suggested copy for newspaper ad
5) publicity article
6) Radio script
7) TV script including lead-ins
8) Salesgirl's ribbon X
9) Statement enclosure X
10) Picture of display card X
11) Package Insert
12) Selling Tips
13) Key Chain
14) Suggested actual wording
15) [illegible]
16) In Store Publication Copy
17) Letter to Salesgirl
18) Letter to Buyer
19) Breakfast Speech

HARVEY CHANLER. 246a
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

AUGUST 26 ARIS STATUS REPORT:

Package:
Charlton printing help up 8/25 for box size change

Promotion:
Items being printed by Barkay:
Presentation folder/suggested layouts/selling tips/ package insert/ letterhead and envelop
Items ready for printing:
Sales aid sheet/enclosure/remittance envelop(samples only to be printed)
Other: Suggested copy to be printed

Display:
Color proof and dummy due from Package & Display Corp.

Other:Salesgirl's ribbon-finished art due
quantity_____
= Glossy: completed

Television bulletin and response sheet-draft ready

Breakfast speech:

Publicity: Local Women's Club

Publicity Party: review?

New enclosure- 3 Emb. Nylon fancy styles

Arlule by Lubowe (book on hand care

Glonby: Cost Glenby
Cost Barkay
Write-up HC

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

247a

November 10, 1968

To: L. Stanton

From: H. Chanler

Subject: Status Report

Retail Ad:
Photo to be taken Tuesday. Layout to be adapted from photo. Copy to be submitted with new layout.

Package:
Design to be developed from photo with appropriate design embellishments.
Three box sizes out for quotation and samples.
Does not include wrap...wrap to be quoted from design.

Sizes:	small	8 3/8" x 3 3/8" x 3/4"
	medium	10 3/8" x 3 5/8" x 1"
	large	13 7/8" x 4 ¼" x 1"

Tissue design and quote to come with package design.

Design quote to be submitted.
Quantities: 60,000 (30,000 small, 15,000 each of medium and large).

Glove label to be part of design assignment.

Medical Report:

Letter sent to Dr. Sherman, a leading dermatoligist who has reccommended a Dr. Peck for the project. Dr. Peck will submit a quote this week.
Also, a Dr. Irwin Lubowe, another leading dermatoligist is being contacted for his interest in this project.

Advertising & Promotion Expenditures- 1st 6 months

The above is being developed and will include all creative preparation costs including packaging as well as packaging costs on and above ordinary costs. Co-op will be figures at 7½% of gross sales. Enclosures will be budgeted for 2nd half only.

November 9, 1968

Dr. Ronald E. Sherman
200 East 62 Street
New York, New York

Dear Dr. Sherman:

As I described to you on the telephone I have a major fashion glove manufacturer as a marketing client. He has a revolutionary development for a glove that we refer to as having cosmetic features. I have prepared a fact sheet which is enclosed. What we would like to do is to develop some basic documentation covering the cosmetic claims. Points (5) and (6) might be more than a cosmetic claim since there might be benefits occurring from internal action. It is believed that this new glove has therapeutic benefits. However for the initial marketing effort only cosmetic type claims would be used.

You mentioned that Dr. Peck would be the right person to conduct the study that would permit my client to state the claims noted in the fact sheet.

As for the procedure, it would probably be along the lines of the attached. This was a plan submitted by a medical man that my client thought not to be to his liking. In addition the doctor wanted to be personally involved which my client prefers not to do. I'm speaking of financial involvement. Since the glove is for women, I would think the patients be female only and since the claims we hope to make have appeal to women 30 years old or over, that the panel concentrate in this age grouping. I would think that the condition of the hands of each member of the panel be predetermined prior to starting the study so that we have a group that we all agree is most advantageous to the study.

If Dr. Peck is interested in handling this project he can call me either at home (KI-8-5141) or my office (201-694-4100). I can furnish him with a pair of gloves and arrange a meeting with my client.

Thank you for your help... Cordially,

November 11, 1968

Dr. Irwin I. Lubowe
667 Madison Avenue
New York, New York 10021

Dear Dr. Lubowe:

Enclosed is the outline prepared for the glove study we spoke about.

I would appreciate hearing how you would handle this project as I am most interested in having my client work with you.

Looking forward to hearing from you,

Cordially yours,

Harvey Chanler

HC:ag

Enc.

250a

November 16, 1968

To: L. Stanton

From: H. Chanler

Subject: Hands Beautiful Product Research Study

There are certain comments that I would like to record at this time regarding the above project. However I first would like to put down what I think is our objective for an initial research study.

Our objective should be: To endeavor to document if the characteristics of the lycra material used for Hands Beautiful combined with the nature of the weave and glove construction produces a massaging action that enables any of the following claims:

Hands feel smoother, softer, lighter
Hands look whiter, younger, more attractive
Gloves help relieve tension, makes the hands feel they have more vitality.

The initial study should probably not delve into the arthritic claims as these claims would most probably require much greater statistical documentation. However there might be borderline claims that the initial study could document.

Aids hand circulation
Reduces stiffness of joints
Helps reduce swollen veins
Continued use has a building effect
Massages nail beds...results in longer, stronger nails.

Dr. Peck would only handle this study using a 100 panel chosen from 200 patients and handle it over a 6 week period. Hiss fee is $10,000.
Dr. Lubowe has yet to respond to my inquire.
Even before he does I suspect that Dr. Hunter's method but with a larger number of people (perhaps 25) would be sufficient for the initial study. However he, you and I should be in agreement as to the types of people (age, condition of hands; income level, occupation) to be studied.

Unless we come up with another medical person or organization for the study we should assign the project to Dr. Hunter and request a draft of the questioncer to be used so that we can review it. I also suggest your lawyer see it and the copy we plan to use for the ad and the package.

I might add that in addition to the ARIS tag we should have a fine package insert , along the lines of the SUpp-Hose booklet but in miniature.

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

251a

To: L. Stanton

From: H. Chanler

Subject: Hands Beautiful Test Market

As I had mentioned, I think we should consider conducting a test this Spring where we would feature a pair of Hands Beautiful gloves at a $10 retail price. The purpose of the test would be to see if the additional sales dollars would pay for additional advertising exposure.

We would endeavor to measure the effect of the normal co-op exposure in a few markets during the Spring '69 introduction (at the $7.98 retail price) vs co-op and radio placed by Aris for the gloves at a $10 retail. The radio would be conducted in 2 markets. To furthur this effort we would endeavor to use radio purchased at the discount rates previously reported on.

The following are a list of markets from which I would like you to select two. The two you select should be representative of Aris typical business.

Fort Lauderdale-Hollywood	56
Knoxville	81
Fresno	69
Canton, Ohio	95
Tucson	102

Once the markets are selected we will have to estimate sales for 6 months. From the estimate we will allocate co-op and advertising dollars and then cost out the plan. We will have to estimate what we think we might do without radio at $7.98 and with radio at $10.

I will pull together market characteristics for the above markets i:e: number of homes in market; medium income; BPI (Buying Power Index).

November 17, 1968

Dec 27, 1963

Mr. Harvey Chandler
4525 Henry Hudson Parkway
Riverdale, Bronx, N.Y. 10471

Dear Harvey:

HANDS BEAUTIFUL

The fabric content is:

19% Lycra
81% Antron Nylon

Re: SENT SERVICE DISPLAY STAND

I think we should also develop some for Hands Beautiful.

The stand should have a cosmetic feeling to it/

Sincerely,

Lari Stanton

LS;k

253a

STATUS REPORT 1/20/69

DR. LUBOWE

Contacted 1/20/69 - Preliminary indications show short term results. Panel to be called in week of 1/27.

Complete tabulated report due by Feb.10.

PACKAGING

Logo - approved

Woven label - layout and stat of logo due 1/ /69

Tag - finished art due 1/20/69

Boxes - sample with Aris

Tissue - Size to be finalized by Aris designer

Photo for package small size complete.

Photo for other 2 sizes due 1/27

Retouching of all 3 sizes to be due week of 1/27.

Mechanicals for boxes - Waiting for photos and Dr. Lubowe's report before completing art.

ADVERTISING

Layout - Retail ad to be reworked when photo is retouched.

Copy to be finalized.

Layout to be printed.

MEDIA - Letters mailing 1/21/69 to buying services.

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

254a

AGENDA - FEBRUARY 18

I Dr. Lubows Report

II Package status
- a) copy
- b) photo and retouching
- c) paste-up-3 sizes
- d) tissue size and copy

III Demonstrators
- a) training program

IV Promotional material
- a) salesmen's presentation
- b) package insert
- c) booklet
- d) letters to buyers and merchandising managers

V Advertising
- a) TV film
- b) retail newspaper ad
- c) Media

VI Production & distribution
- a) production capability
- b) markets for initial introduction
- c) sales forecast for 1969 in launch markets
- d) scheduling

VII Creative meeting for Hands Beautiful and conceptual ideas for regular line for youth market.

VIII Hands Beautiful Presentation for Consolidated Foods

H. Chanler

HARVEY CHANLER 255a
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

March 13, 1969

Dear Lari,

Spoke to Gilda and my wife (both very aware of today's scene). Both reacted similiar to my reaction, that Love Glove is a good name but it would be ideal for a youth oriented line. Gilda is going to talk to others including Howard Chanler and we will get back to you early next week.

Enclosed is the copy we suggest for the box and tissue. Once you can give me size approval we would give you a tight tissue of the elements before going into preparing the paste-up. Naturally it all hinges on the final agreement of the name.

Also enclosed is a copy of the letter to Dr. Lubowe.

Lari, I suggest you immediately proceed to protect the Love Glove name, if it is available.

In the interum I am writing up last nights meeting with Bernie Miller and am working on pulling together a merchandise and marketing recommendation for a youth program.

Will call you Monday.

Sincerely,

Harvey Chanler

March 13, 1969

Dr. Irwon I. Lubowe
667 Madison Avenue
New York, New York

Dear Dr. Lubowe:

Enclosed is the newspaper advertising copy we have rewritten after we reviewed the Hands Beautiful Glove study undertaken for Aris Gloves.

Would you kindly look it over and let Mr. Stanton know if in your opinion the copy claims are in line with the results of the study. He would appreciate your comments in letter form.

Thank you for your cooperation in seeing this project through.

Sincerely,

Harvey Chanler

HC/cc L. Stanton

March 21, 1969

Mr. Phil Snyder
Shomer-Majestic Box Company
335-341 West 16th Street
New York, New York 11

Dear Phil:

Mr. Stanton of Aris Glove Company has finalized the 3 sizes for the new glove which we have been working on. He has given me <u>new</u> inside dimension for the bottom. Our packaging man who is handling the final art needs 2 things from you:

1) An actual set of boxes to the final specs.

note: They are to be sent to-
Mr. Hal Leitstein
55 East 52nd Street NYC

2) Blank wraps for the tops, trimmed to the exact trim size you would expect to receive from our printer, Barkay Printing House. Also indicate in pencil the areas for the top and side panels directly on the blank wraps and note the specific dimensions. We should have this as the top section will be bigger than the bottom section and we should know by how much.

Inside Dimensions

	L	W	D
Small	8 5/8"	3½"	3/4"
Medium	10½"	3 5/8"	1"
Large	14"	4 3/8"	1"

note: Is 5/8" underflap the required dimension for all 3 sizes?

Your November 21 quote was as follows:

30,000.....$62.00 per M
15,000..... 55.20 per M
15,000..... 49.90 per M

We assume the quote holds if the order is placed by May 1, or does the new size effect it?

BEST COPY AVAILABLE

Also, would we benefit from an order that doubles the quantity (120,000 boxes)?

Phil, once you receive the wraps, how long should Aris allow for delivery?

The weight 63 the top wrap will be 70 lb coated, two sides. If we make it coated 1 side only, would it matter to you?

When Aris sends you their order they should include mention that they must receive 2 sets of samples with the actual box wrap on it for their final approval of fit and overall appearance.

Thanks for your usual cooperation.

Very truly,

Harvey Chanler

CC: Hal Leitstein
Howard Chanler
Jack Barrish-Barway

March 21, 1969

Mr. Jack Barrish
Barkay Printing House
140 West 22 Street
New York, New York

Dear Jack;

We have your December 26th quote for the 3 Aris Glove box wraps. However the trim sizes have changed slightly. They will be very close to the following:

Small.....11½" x 6 3/8"
Medium.....14" x 6 7/8"
Large.....17 ½"x 7 3/4"

Would you please check the following:

1) Review your last quote to be sure the sizes are not changing costs.

2) Figure all line art...the 2nd color to be transparent ink.

3) Do we need "coated 2 sides" stock or can we save money if it is "coated 1 side"?

4) Lari might order double the quantity therefore please estimate both:

	original quantity	proposed quantity
small	30,000	60,000
medium	15,000	30,000
large	15,000	30,000
total	60,000(5M dz)	120,000(10M dz)

5) Allow for 5% overrun, required by Shomer-Majestic.

Sincerely,

Harvey Chanler

cc: L. Stanton

March 21, 1969

Mr. Howard Chanler
1312 Lyle Terrace
Fairlawn, New Jersey

Dear Howard:

The enclosed copy has been approved by Lari Stanton for the Handa Beautiful tissue paper. Please revise the layout using the same circular design.

Also enclosed is the copy for the box wrap design. Please make any final adjustments of the 3 boxes to be sure the copy lays out well, especially since we have new final specifications for size. Hal Leitstein will work with on the mechanicals and retouching.

Please be sure Hal gets a good negative of the logo.

See the attached letter to Gilmer-Majestic the box manufacturer. Remember the sizing for the top will be slightly larger than the bottom inside tray dimensions.

When the mechanicals are ready to show Lari we should have 4 to 6 color suggestions from which he can select about 3. The wrap printer, Barkay, will prepare color proofs for final selection. The same color will be needed for the tissue.

I hope to see Lari Tuesday with the mezzotint sample and the layout for the booklet.

DHarvey

cc: Hal Leitstein
Lari Stanton

BEST COPY AVAILABLE

April 3, 1969

Mr. Harvey Chandler
4525 Henry Hudson Parkway
Bronx, N.Y. 10471

Dear Harvey:

Re: BOX WRAPS

We buy our box wraps from Charleton Lithographers.

I think we should get a quotation from them for our new HANDS BEAUTIFUL box wrap.

Very truly yours,

Lari Stanton

LS;k

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

262a

April 20, 1969

Mr. Lari Stanton
Aris Glove Company
10 East 38th Street
New York, New York

Dear Lari;

Howard Chanler and I met today and reviewed the following subjects:

1) Copy-review headline for package i:e: cosmetic fashion glove etc.
2) Review positioning of copy on front panel of all 3 packages
3) Finalize use of mezzotint
4) Order mezzotint (if agreed upon) from Martin Weber Company.
5) Prepare 3 color recommendations for package, tissue and package insert.
   a-obtain stock samples from Barkay for selection of color alternatives for package insert.
6) Revise newspaper layout and copy to relate to latest package copy approach.
   a-submit new layout and typed copy.

Howard and I discussed the copy for both taking in our latest discussions. He and Gilda will review it Monday and will call you.

We did agree that the mezzotint should definitely be used and that the glove should be in the process also, but with refinments (which Howard will handle with the company that prepares it).

We should have all of the above Wednesday and Howard and I will meet with you to review all of it.

Sincerely,

Harvey Chanler

April 21, 1969

Mr. Harvey Chandler
4525 Henry Hudson Parkway
Bronx, New York 10471

Dear Harvey

RE: HANDS BEAUTIFUL:

I would like you to prepare a bulletin to our salesmen indicating:

1) What it does

2) Why does it do it

3) What proof do we have.

Sincerely yours,

Lari Stanton

LS:k

264a
Bovina Center, New York
ZIP CODE 13740

5/11/69

Lore—
Went away with the family for the weekend and could only find this script typewriter—

As we discussed next week we should put everything to bed (except for the display card + publicity bit). Please arrange a meeting with Barbara Kling.

Thanks
Andy

ARIS STATUS REPORT

	Due
I PACKAGES:	
a) Mechanicals being revised to elect the new wider width, new copy, revised layout and imprint area.	5/14
b) Mezzotints being produced	5/14
II TISSUE:	
a) Finished art completed	
b) Colors submitted by Howard Chanler	
c) J.F.Auer, tissue manufacturer contacted for production of tissues	
III PACKAGE INSERT:	
a) Finished art completed	
b) colors submitted by Howard Chanler including stock recommendation	
c) Barkay to be printed after final review of copy is approved.	
IV SALESCARE CARD:	-
a) Copy completed	5/14
b) Layout due	5/21
c) Finished art due	5/21
d) Estimate for printing and lamination due (250)	
V SALESMEN'S BULLETIN:	
a) Revised copy due	5/12
VI PUBLICITY KIT:	
a) Meeting needed with Barbera Kling	
VII NEWSPAPER SAMPLE:	
a) Final version due	5/20
b) Glossy and typed copy needed	5/27
VIII ADVERTISING:	
a) Print-Playbill and Vogue costs and demographics reviewed, both showing favorable emphasis to women over 30 in the smaller circulation category of womens magazines.	
b) Creative team meeting with tape and film sources and a few directors and producers in order to obtain reaction and costs for the general creative approach initially discussed. 60's and 30's to be carried out. A TV storyboard will follow after the above meetings are held.	
c) TV rates- Joyce Peters of US Media to meet with H Chanler and C. Stanton to review costs with emphasis on Pittsburg.	5/14
IX ARIS REPRESENTATIVE	
a) Howard Chanler checking with ARIS cosmetic buyer to obtain names of organizations offering representative sales help.	
b) Harvey Chanler to check with Annette Tester, cosmetic representative of Bloomingdales.	
X COUNTER DISPLAY:	
a) Spec at laminated display card should be developed that shows the photo used on the package and includes a holder for package inserts.	

5/10/67 Harvey Chanler

May 24, 1969

Mr. Lari Stanton, President
Aris Glove Company
10 East 38th Street
New York, New York

Dear Lari;

Enclosed is a letter to Dr. Lubowe for your reference. Mr. Graham and I plan to meet with you Wednesday at 6:pm.

Monday I will have the revised mechanicals for the three packages and will drop them off at 6:oo. If you wish to review them fine, otherwise we can either do it Tuewday or Wednesday when we meet with Graham.

There are a number of items pending which we were waiting for final copy approval before furthuring them:

1) Newspaper ad (you have roughs)
2) Salesgirl's Selling Tips Card (you have copy & layout)
3) Laminated Display Card and package Insert holder. (we will use the proof of the package to develop a sample).
4) Statement enclosure(copy and layout being prepared this week)
5) Remittence envelop (copy and lauout being prepared this week).

Lari, numbers 3 and 4 were requested by you in a letter and we should discuss them briefly although I have asked Gilda to start the copy.

Sincerely,

Harvey Chanler

cc: Howard Chanler
Gilda Block

267a

May 24, 1969

Dr. Irwin I. Lubowe
667 Madison Avenue
New York, New York

Dear Dr. Lubowe:

After reviewing the various copy points prepared for Aris's Hands Beautiful Gloves we contacted Mr. Andrew Graham an experienced lawyer in the cosmetic-proprietary field.

Mr. Graham, who appeared to be familiar with your work from the past will be meeting with Mr. Stanton and myself next week to review all of the packaging, promotion and advertising material completed and now ready for printing.

I briefly reviewed the project with Mr. Graham which resulted in his asking four questions:

1- Medically speaking exactly what does the massage do?
2- What do the gloves do toy circulation?
3- Is there any proof or any theory to support moisturizing claims?
4- Does the glove promote perspiration?

In your May 16 letter to Mr. Stanton regarding circulation you mentioned 'isometric' effect which improves circulation. We assume 'isometric' is used in a similiar manner as the word 'massage', and that the last sentence in your letter answers Mr. Graham's first 2 questions.

The last 2 questions Mr. Stanton will discuss with Mr. Graham.

The purpose of this letter is just to keep you abreast of our progress. If our meeting with Mr. Graham requires any further explanation, Mr. Graham or myself will contact you.

Thank you for your continued cooperation.

Sincerely,

Harvey Chanler

cc L. Stanton
A. Graham

4525 HENRY HUDSON PARKWAY, N.Y., N.Y. 10471, 212-243-9476 FACTORY: 1123 BROADWAY, N.Y., N.Y. 10010

June 7, 1969

Mr. Lari Stanton
Aris Gloves, Inc.
10 East 38th Street
New York, New York

Dear Lari;

Enclosed is the suggested revised copy for the package and package insert together with my letter to Andrew Graham.

To save time, I am having Hal Leitstein, our paste-up artist set type for the package.

Miss Neufeld of the design and copyright service informed me that the name Hands Beautiful has been cleared for the Cosmetic and Clothing catagories. She has also checked the Textile Fabrics catagory (42) and since she has not called me we can assume it is cleared for that as well. However I will call her Monday morning to double check.

I have worked out the costs for the spring '70 package inserts and for the TV production and will have it typed up Monday. We have to confirm one TV cost. It appears it will come in under $5000.

Sincerely,

Harvey Chanler

cc: Howard Chanler

269a

June 24, 1969

To: Larry Stanton

Subject: TV COMMERCIAL

TULCHIN STUDIOS	$8,747
BSKS PROD.	$7,620
DE ROMA PROD.	$4,875
KBD PROD.	$5,500

Above estimates based on discussion of preliminary outline of storyboard and include a 30- and 60-second film commercial in color. Includes: talent, and all expenses to answer print.

Harvey Chanler

/ch

10 copies - 13.50 each

July 7, 1969

Mr. Andrew Graham
551 Fifth Avenue
New York, New York

Dear Andrew;

Enclosed is a copy of the Hands Beautiful package insert. It was taken from the blueprint. We think it reflects most or all of the suggestions made by you and Dr. Lubowe. Dr. Lubowe was sent a copy and was asked for his comments. When I hear from him, Lari asked that I review them with you.

In a few days we should also have proofs of the packages which we will also send to you.

Lari asked that if the 'push and pull' isometric action of the glove is a form of massaging action, is it safe to assume that it is comprable to saying 'helps circulation'? The 'push and pull' statement is an expression we just came upon and have in the TV script. By the way, we will be sending you the script in a few days.

Andrew, we are looking for a statment regarding Hands Beautiful's effect on bulging veins. The following are a few thoughts:

"works on flattening veins"
"works on keeping veins of back of hand
from getting larger'
"helps push down unsightly veins"
"helps veins from becoming more prominent"
"[illegible]"

At this time all we know is that it temporarily helps. I asked Dr. Lubowe if he thinks a clynical could be done on the subject. While he did not think continued use of Hands Beautiful will help flatten veins more so (because of their 'elastic' bounce back nature) he said he would give it additional thought.

Will speak to you shortly.

Sincerely,

Harvey Chanler

HC/cc

4525 Henry Hudson Pkwy.
Bronx, New York
July 18, 1969

U.S. Media
375 Park Avenue
New York, N.Y.

Attn: Miss Joyce Peters

Dear Joyce:

Enclosed are two TV documents Lari Stanton of Aris had received.

St. Louis, which shows costs and stations for Famous Barr and Lazarus, in Cleveland which shows package costs but no stations. As we discussed, would you write Lari (and myself) and respond to the documents explaining to Lari the many reasons why he should be using U.S.Media and endeavoring to handle this himself. Include mention of U.S. Media forwarding tapes, etc.

In the fall, he will be in limited market distribution which includes the 5 noted markets. He will be national in Spring '70.

Looking forward to hearing from you.

Sincerely,

_____

HC:sb

BEST COPY AVAILABLE

TO: Lari Stanton

FROM: H. Chanler

RE: 60" Commercial vs. 30"

As of the first quarter 1969, 64% of all television commercials produced by major television advertisers were of 30 second commercial length. This development was brought about due to stations revision of costs making the 30 second far more economical. In the past, stations charged 75-80% of the minute rate for a 30 second spot. After bitter complaint over the last several years from major TV advertisers, stations gradually began to adjust the 30 second rate to 60% of the minute rate.

Westinghouse stations are setting the precedent by dropping the 30 second cost to 50% of the minute rate. It is expected that other stations across the country will follow suit.

A 30 second spot delivers 67-73% awareness and recall of the minute participation.

273a

IRWIN I. LUBOWE, M.D., F.A.C.A.
667 MADISON AVENUE
NEW YORK, N. Y. 10021
TEL: 838-1515

DIPLOMATE,
AMERICAN BOARD OF DERMATOLOGY

July 16, 1969

Mr. Harvey Chandler
4525 Henry Hudson Parkway
Bronx, New York 10471

Dear Harvey:

I have examined the insert for the "Hands Beautiful gloves and find it suitable. In any discussion about the circulation, of the diminished appearance of the veins, it is essential that emphasis be made on the temporary effect. Suggested copy is as follows: "To help the veins from becoming prominent by tempoarily reducing the bulge.

Sincerely yours,

Irwin I. Lubowe, M.D.

IIL:ilk

274a

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

1 H. Chanler

To: Lari Stanton
From: Harvey Chanler

September 3, 1969

Subject: Glemby Beauty Salons Magazine Cover Advertising Program

Attached is a list of department stores Glemby has salons in. The list is developed from the list of markets that Hands Beautiful is being launched in.

The stores that are definite Hands Beautiful accounts are:

		3 month traffic	# salons
1) Famous Barr.....	St.Louis	65,000	7
2) Carson, Pirie, Scott.....	Chicago	54,000	8
3) Bromson,.....	Chicago	8,500	3
			18

In addition Wieboldt in Chicago might be added which has a 3 month traffic figure of 32,000.

Glemby is willing to include for a 3 month period the Hands Beautiful stores for a test at a cost of $1000.(Mr. Keough has to finalize this figure with his management). In addition, if Hands Beautiful goes national with the program and the 3rd cover is available Glemby will permit usage of only those stores selling Hands Beautiful.

There would be an additional cost for the insert which for the test would require approximately 800 pieces.

The insert would also include a pad of 50 'take one' invitations that would read:

Introducting the cosmetic-fashion glove

You are invited to the Hands Beautiful by Aris Glove Bar in our glove department. to experience a revolutionary concept in hand care.
Come see and feel Hands Beautiful by Aris and learn how it may help bring new found beauty to your hands.

In addition to the ad insert and invitation Glenby will cooperate in some or all of the following merchandising ideas:
1) Every woman obtaining a manicure will be handed the Hands Beautiful 2 color enclosure. We recommend each salon be furnished with 1000 enclosures with the store's imprint.
2) The counter display with the package inserts would be placed at the cash register of each salon.
3) Glemby will offer a $8 pair of H.B. gloves to salon personnal at a special low price.

The Clemby Company

Selected City Store Listings and Traffic

City	Store	Units	Traffic (3 months)
Chicago	Carson, Pirie	8	54,000
	Korvette	4	17,000
	Wieboldt	8	32,000
	Bramson	3	8,500
Atlanta	Davison Paxon	3	19,000
	Sears, Roebuck	1	2,700
St. Louis	Famous Barr	7	65,000
	Mansion House	1	4,000
	Vandervoort	1	1,400
St. Paul	Field-Schlick	2	6,700
	Sears, Roebuck	1	2,800
Pittsburgh	Sears, Roebuck	1	3,000

September2, 1969

Mr. Stan Meyer
Meyer Lab-Bldg Company
5 East 16th Street
New York, New York

Dear Stan:

This is to confirm that Wednesday afternoon you will be receiving the art for the Hands Beautiful by Aris salesgirl ribbon. The item is very similar to the Harbison sample you gave to me. Enclosed is a tissue indicating the color of the robbon we would like you to try to ma tch and the ink color.

Print 5000 with a single strip along the top on the back. The price would be $60 per M plus the cost for the cut. Please send a confirmation to:

Mr. Lewi Stanton
President
Aris Gloves
10 East 38th Street
New York, New York

Mail a copy to me at the above address.

Delivery of the job goes to the same address as noted above for Aris.

Sincerely,

Harvey Chanler

cc: L. Stanton

August 30, 1969

Mr. Herbert Saltzman
Vice President, Sales
WOR
1440 Broadway
New York, New York

Dear Herb:

Enclosed is the script Aris Gloves is contemplating producing for a TV campaign. Since Hands Beautiful has such an unusual story (A cosmetic-fashion glove) we thought it best to see if we could obtain some guidance regarding the area or areas where Aris should concern themselves to obtain clearance. We realize that the final word can only come when the commercial is submitted in final form. However there may be some points that your continuity department might bring up that would help Aris for the future.

For your information Hands Beautiful was tested by Dr. Irwin Lubowe a leading dermotoligist. He used a panel of 25 nurses that use their hands in their daily work routine...more than the average person. We have Dr. Lubowe's summary of this study that backs up the statements in the commercial.

As I told you, once Aris is ready to launch Hands Beautiful in the New York market we plan to include WOR-TV on the schedule.

Anything you can do to help us with the above is greatly appreciated.

Sincerely,

HarveyChanler

cc: L. Stanton

September 3, 1969

Mr. Dennis Holt
Executive Vice President
U.S. Media International Corp.
375 Park Avenue
New York, N.Y.

Dear Dennis:

Enclosed is the TV script Aris is planning to produce for their forthcoming TV campaign. Since Hands Beautiful has such an unusual story, (a cosmetic-fashion glove), we thought that you might be able to obtain some guidance from the continuity departments of the major networks or leading local stations. We realize that the final work can only come when the finished commercial is available. However there may be some points that they could raise now that would help us in preparing the commercials and coming up with the needed supporting data.

If you recall the item was tested by Dr. Lubove a leading dermotologist. He used 26 nurses as the panel and has furnished Aris with supporting data.

Needless to say Lari Stanton is definitely planning to work with your company and the above request is to help him get things off in the right direction.

Thanks for your cooperation.

Sincerely,

Harvey Chenler

HC/cc

cc: L. Stanton

HANDS BEAUTIFUL MARKETING

BACKROUND:

Hands beautiful has been introduced into a select few accounts around the country. While it is still too early to draw meaningful conclusions, it appears that the initial newspaper ads have not created an immediate consumer response.

THE INITIAL LAUNCH STORES WERE:

Marshall Field, Chicago

Woodruff and Lathrop, Washington, D.C.

Bergdorf Goodman, New York

Dayton Company, Minneapolis

Rich's, Atlanta

However, there appears to be a delayed response at Marshall Field due to what appears to be word of mouth recommendations. Consultants also appear to generate better sales. Also, Joseph Horne is planning an intense radio campaign within the next 30 days.

PROBLEMS:

At this stage, the exact reason cannot be pinpointed for the moderate performance at the store level. It could be from any one, or number of the following reasons:

1) Glove sales today are down.
2) Weak newspaper advertising approach.
3) Lack of consumer advertising from the manufacturer that would pre-sell the consumer.
4) Hard-to-believe claims.

5) Lack of frequency in running the store ads. 280a

6) Wrong emphasis (middle of the road instead of being stronger on the ~~consumer~~ cosmetic benefits).

7) Lack of personality endorsement.

8) Retail price.

9) Sales training.

In addition to the above problems that relate to the specific ad, we have also experienced varied negative response from the networks on copy clearance. The following is the individual summary of each.

NBC: (Miss Henderson)

1. Require control group for claims: reduce redness or dryness. Massaging, softening, smoothing.

ABC: (Miss Fates)

1. Require in writing definition of isometric action.
2. Require adjective before claims: i.e. works to help reduce redness, etc.
3. Point out temporary effect.
4. Asks minimum time to see effects...(2 weeks).

CBS: (Miss McGettrick)

1. Would like to see modified script and better explaining of isometric action.

WOR-TV: (Mr. Mahey)

1. They are vague yet appear to avoid basic claims in their suggested script.

COURSE OF ACTION:

1) Keep a careful eye on the launch stores for sparks of areas that could be adaptable across the board i.e., Horne's radio pro. am; new ad approaches; follow up advertising campaign.
2) Investigate use of a female personality for Hands Beautiful...to be used for radio and/or television and personal appearances i.e., Arlene Francis.
3) Rework the script and send a letter to networks to set the stage for future television production.
4) Investigate proposals and costs for a medical study that would fill the needs of the continuity departments of the networks: i.e., Control group lasting effect,
5) Meet with the creative group and develop other ideas for other ad approaches.
6) Recommend media approaches for a consumer program to pave the way for store ads.
7) Intensify distribution to sales personnal for personnal use and demonstration use
8) Follow airline stewardess use for endorsement base.

Def. Ex. A

Analysis of Harvey Chanler Statements
for Marketing Services, Hands Beautiful.

Statement Date	Time Covered	Amount	
11/10/68	10/3 - 11/4 1968	$435	
12/5/68	11/4 - 12/4 1968	$435	
1/7/69	[December 1968]	$435	
2/7/69	[January 1969]	$435	
3/12/69	2/4 - 3/4 1969	$435	
	[statement for March 1969 missing, but records reflect payment of $435 on April 14, 1969]	$435	
5/7/69	4/14 - 5/5 1969	$435	
6/6/69	5/5 - 6/4 1969	$435	
7/7/69	6/5 - 7/3 1969	$435	
8/5/69	7/4 - 8/4 1969	$435	
10/6/69	8/4 - 9/4 1969	$435	
	9/5 - 10/3 1969	$435	
11/5/69	10/6 - 11/1 1969	$435	
11/15/69	11/1 - 11/15 1969	$215	
	10/3/68 - 11/15/69	$5870	Total

283a

HARVEY CHAMBER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

November 10, 1968

Aris Glove Company
10 East 38th Street
New York, New York

Att: Mr. Larry Stanton

For marketing services rendered
for Hands Beautiful new product
marketing program.

October 3, to November 4, 1968

$435.00

OK
L
pay L

PAID
NOV 1968

6942

284a HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

December 5, 1968

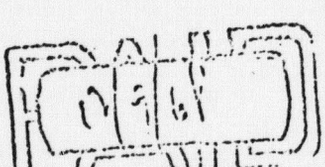
Aris Glove Company
10 East 38th Street
New York, New York

Att: Mr. Larry Stanton

For marketing services rendered
for Hands Beautiful new product
marketing program.

November 4 to December 4, 1968

$435 OK



90%

285a

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

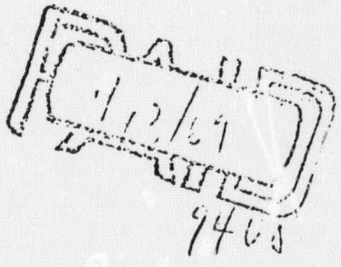
January 7, 1969

Aris Glove Company
10 East 38th Street
New York, New York

Att: Mr. Lari Stanton

For marketing services rendered
for Hands Beautiful marketing
program.

$435



286a

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

February 7, 1969

Aris Glove Company
10 East 38th Street
New York, New York

Att: Mr. Lari Stanton

For marketing services rendered
for Hands Beautiful marketing
program.

$435.

OK

9773

2/28/69

287a

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

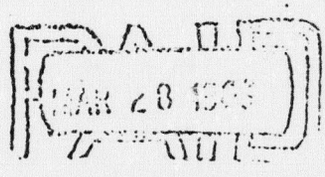
March 12, 1969

Aris Glove Company
10 East 38th Street
new york, new york

Att: Mr. Lari Stanton

For marketing services rendered
for Hands Beautiful marketing
program.
February 4 to March 4, 1969

$435



7786

288a

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

May 7, 1969

Aris Glove Company
10 East 38th Street
New York, New York

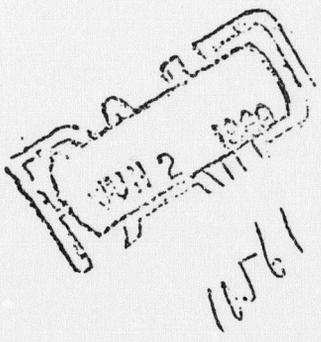
att: Mr. Lari Stanton

For marketing services rendered
for Hands Beautiful program.
April April 4 - May 5, 1969

$435

OK

703



G

289a

4525 HENRY HUDSON PARKWAY, N. Y., N. Y. 10471, 212-243-9476 FACTORY: 1123 BROADWAY, N. Y., N. Y. 10010

June 6, 1969

Aris Gloves, Inc.
10 East 38th Street
New York, New York

att: Mr. Lari Stanton

For marketing services rendered

for Hands Beautiful program.

May 5 to June 4, 1969

$435

make check payable to:

Harvey Chanler
4525 Henry Hudson Parkway
Bronx, New York 10471

JUL 10 1969

290a

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

July 7, 1969

Aris Gloves, Inc.
10 East 38th Street
New York, New York

att: Mr. Lari Stanton

For marketing services rendered

for Hands Beautiful program.

~~May 5 to June 4, 1969.....~~ $435* Paid 4/1 P.

June 5 to July 3, 1969..... $435 — P/C

Total ~~$870~~

*past due

B-3 -

Mailed
Can you
check
if this
was paid
& if not
please pay it!
6.35

JUL 17 1969
1969

4525 HENRY HUDSON PARKWAY, N.Y., N.Y. 10471

291a

August 5, 1969

..oves Inc.
10 East 38th Street
New York, New York

Att: Mr. Lari Stanton

For marketing services rendered
for Hands Beautiful program.

May 5
July 4 to August 4, 1969.....$435

AUG 22 1969
11166

292a

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

October 6, 1969

Aris Gloves
10 East 38th Street
New York, New York

Att: Mr. Lari Stanton

Miller
Can you check of this amt. and let me know

For marketing services rendered:

August 4 to September 4, 1969 $435

September 5 to October 3, 1969 435 OK

Total - $870

703

C 3J

OCT 9 1969

1451

293a

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

November 5, 1969

'ris Gloves
10 East 38th Street
ew York, New York

tt: Mr. Lari Stanton

For marketing services rendered
October 6 to November 1, 1969
$435

OK

$5

NOV 10 19

6-1127

294a

HARVEY CHANLER
4525 HENRY HUDSON PARKWAY
NEW YORK, N. Y. 10471

November 15, 1969

Aris Gloves
10 East 38th Street
New York, New York

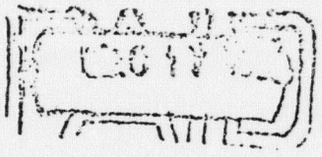
att: Mr. Lari Stanton

For marketing services rendered

November 1 to November 15, 1969

$215

OK



20607

67

55th STREET AND MADISON AVENUE
NEW YORK, N. Y. 10019

295a

10 E. 38TH ST. NEW YORK, N. Y. 10016

19

PAY — DOLLARS AND CENTS — $

TO THE ORDER OF

Sally Torbie2224
12 Perry Avenue,
New York, N. Y. 10003

ARIS GLOVES
DIVISION OF CONSOLIDATED FOOD CORP.

⑆0210⑈0067⑆16 050 438⑈

CHECK № 01162

ARIS GLOVES
DIVISION OF CONSOLIDATED FOOD CORP. REMITTANCE STATEMENT

IRVING TRUST COMPANY

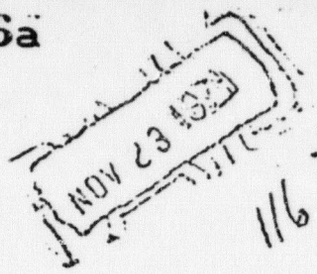
DESCRIPTION		AMOUNT
11/12/71 Statement	230.00	
1170		

PAYEE SHOULD DETACH AND KEEP THIS STATEMENT

1170

BEST COPY AVAILABLE

296a



1639

November 12, 1971

Aris Gloves-Isotoner Cosmetics
10 East 38 Street
New York, New York

S T A T E M E N T

For creative services
Isotoner "Eyes Beautiful" Masque.....$200.00

$200.00

OK

Julie Porcelli

1170

NEW YORK, N. Y. 10014

297a - 10 E. 38TH ST. NEW Y[illegible] N. Y. 10016

[illegible]AY

[illegible] $

O THE
ORDER
OF

Julia Parricelli
11 Fifth Avenue
New York, New York

ARIS GLOVES
DIVISION OF CONSOLIDATED FOOD CORP.

⑆0210⑈0067⑆16 060 438⑈

CHECK № 01101

ARIS GLOVES
ION OF CONSOLIDATED FOOD CORP. REMITTANCE STATEMENT

IRVING TRUST COMPANY

DESCRIPTION			AMOUNT
Total $150.00			

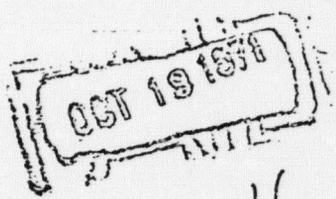
PAYEE SHOULD DETACH AND KEEP THIS STATEMENT

298a

JULIA PORRICELLI
11 FIFTH AVENUE
NEW YORK, N.Y.

October 13, 1971

Mr. Lari Stanton
President,
Aris Gloves, Isotoner Cosmetics
10 East 38 Street
New York, New York



1016

STATEMENT

For creative services, Isotoner Cosmetics -
"Chin Beautiful Strap".....$150.00

$150.00

1164

Julia Porricelli

Service of one copy of the within Appendix is hereby admitted this 18th day of October, 1976.

Phil J. Henderson Gen'l Counsel

Attorneys for Plaintiff-Appellant-Cross-Appellee